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Substantive Criminal Law through the Looking Glass of *Rummel v. Estelle*: Proportionality and Justice as Endangered Doctrines

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SUBSTANTIVE CRIMINAL LAW THROUGH THE LOOKING GLASS OF RUMMEL V. ESTELLE: PROPORTIONALITY AND JUSTICE AS ENDANGERED DOCTRINES

by
*Joshua Dressler**

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[Defense Counsel]: Mr. Chief Justice Burger, you are absolutely right. But if the State mandated a life sentence for one parking ticket . . . we have no doubt that the Court would find that sentence excessive. No question of—

Question (Burger): You are dealing with one parking ticket or three parking tickets, here, are we?

[Defense Counsel]: Even three parking tickets, your Honor.

Question (Burger): We are not dealing with them in this case.¹

I. INTRODUCTION

On April 26, 1973, William James Rummel was sentenced to spend the rest of his life in a Texas prison because he was an habitual offender.² During a nine-year period, Rummel was found guilty of three felonies. In that "crime spree," Rummel amassed \$229.11 in criminal earnings. On March 18, 1980, the United States Supreme Court, by a five-to-four margin, declared that Texas could constitutionally so punish Rummel because the punishment was not prohibited by the cruel and unusual punishment clause of the eighth amendment to the United States Constitution.³

The decision received widespread lay attention, generally critical.⁴ It deserves even more serious academic consideration. Although the potential effect of the decision on William Rummel is painfully clear,⁵ the impact of *Rummel* on the criminal law is less obvious. It does appear, however, that the case should have a substantial negative impact on the criminal justice system. The decision may virtually immunize all habitual offender statutes, no matter how severe, from eighth amendment constitu-

1. Oral Argument in the Supreme Court of the United States at 19, *Rummel v. Estelle*, 445 U.S. 263 (1980) [hereinafter cited as Oral Argument].

2. *Rummel v. Estelle*, 445 U.S. 263, 266 (1980).

3. *Id.* at 285. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

4. *E.g.*, *Collect \$230 and Go To Jail*, THE ATLANTIC MONTHLY, July 1980, at 14; Editorial, *Cruel as Usual*, THE NATION, Apr. 5, 1980, at 387; *Strict Views of the Law*, NEWSWEEK, Mar. 31, 1980, at 40. *But see* Kilpatrick, *Justice Rehnquist vs. Justice Powell*, WASH. STAR, Mar. 29, 1980, § A, at 11, col. 1.

5. Subsequent to the Supreme Court's denial of Rummel's eighth amendment claim, which is the subject of this Article, the Federal District Court for the Western District of Texas granted Rummel's application for writ of habeas corpus. *Rummel v. Estelle*, SA-76-CA-20 (W.D. Tex. 1980). After conducting an evidentiary hearing, Senior United States District Judge D.W. Suttle concluded that "the total failure of Rummel's [court appointed trial] lawyer to contact any potential witnesses and to even attempt to investigate the case, prejudiced Rummel enough to require [pursuant to the sixth and fourteenth amendments right to counsel] a new trial." *Id.*, slip op. at 7.

tional scrutiny. More broadly, the decision could spell the death-knell of the eighth amendment "proportionality" doctrine in nondeath penalty sentencing decisions.⁶ Even more seriously, the case undercuts certain vital philosophical premises of the criminal law.⁷ As a result, *Rummel* may frustrate various reform efforts and hasten regressive efforts in the substantive criminal law field.⁸

Justice Rehnquist, in another forum, has properly called for reasoned and objective analysis of Court opinions.⁹ This Article attempts that type of analysis of *Rummel*.

After discussing the legal and philosophical background for *Rummel*, this Article demonstrates that the majority opinion in *Rummel* is poorly crafted, displays an inappropriate deferential attitude to legislative bodies, is jurisprudentially unsound, and was affected by inappropriate arguments and concessions by the parties.¹⁰ In addition, this Article explains the likely impact of *Rummel* on criminal law doctrine and suggests possible avenues for continued litigation and argument.¹¹

This Article is intended to be an objective, but impassioned, call to action. Too often in the past substantive criminal law has been the stepchild of the criminal justice system, and the legal profession has failed in its responsibility to protect fundamental rights implicated by the substantive criminal law. Practicing lawyers have at times demonstrated insensitivity to, or ignorance of, important jurisprudential principles, and the direction of the substantive criminal law has been affected by such professional shortcomings. Furthermore, decisions implicating the substance of the criminal law have too often suffered from poor craftsmanship or jurisprudential error by the judiciary.¹²

The legal community as a whole seems at times to view criminal procedure as the more important, or more interesting, subject. Yet, substantive criminal law is paramount. Whether a citizen is assured a lawyer at a trial matters little to the overall concept of justice if he may be tried for the crime of tuberculosis. Fairly apportioned burdens of proof between "crime" and "defense" are meaningless if the legislature may deny an insane person the defense of his madness. Limits on the state's right to use two prior larcenies to prove guilt in a third theft case are of small consolation to the person whose prior crimes can be used to justify a mandatory sentence of life imprisonment after he is convicted for the third theft.¹³

The intent of this Article is to demonstrate to both the judiciary and the

6. See notes 407-49 *infra* and accompanying text.

7. See notes 360-400 *infra* and accompanying text.

8. See notes 456-66 *infra* and accompanying text.

9. Rehnquist, *Act Well Your Part, Therein All Honor Lies*, 9 HUMAN RIGHTS 42 (1980).

10. See generally notes 229-405 *infra* and accompanying text.

11. See generally notes 405-66 *infra* and accompanying text.

12. See generally notes 172-228 *infra* and accompanying text.

13. See Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 436-37 (1971); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 411 (1958).

legal community in general not only the objective need for reform of the criminal justice system, but more significantly, the need for a reasoned and jurisprudentially aware judiciary that can become actively involved in the reform. *Rummel* serves both as evidence of the problem and as a starting point for the solution.

II. RUMMEL: THE HOLDING¹⁴

On August 15, 1972, David Lee Shaw gave William Rummel a check for \$120.75 in return for the latter's promise to repair or replace Shaw's defective air-conditioning compressor. Rummel attempted unsuccessfully to purchase a new compressor, and, upon failing that, to retrieve the old air conditioner. He never performed the repairs, however, even after cashing Shaw's check.¹⁵ Rummel was indicted and convicted of obtaining the money under false pretenses. Although the Texas Legislature later reclassified the crime as a misdemeanor,¹⁶ it was a felony in 1973.¹⁷ The indictment also cited Rummel's two prior convictions: presenting a credit card with the intent to defraud another of approximately \$80.00, and passing a forged instrument with a face value of \$28.36. Both acts were felonies in Texas at the time of their commission.¹⁸ Pursuant to a Texas recidivist statute that mandated life imprisonment for any three-time felon,¹⁹ Rummel received a sentence of life imprisonment. Obtaining money under false pretenses, without such enhancement, carried a two- to ten-year prison sentence.²⁰ Under the enhanced sentence, Rummel would become eligible for parole consideration after approximately twelve years in prison.²¹

The Texas Court of Criminal Appeals affirmed his conviction,²² and Rummel's applications for post-conviction relief in the Texas courts were

14. Because the author takes issue with the Court's craftsmanship, precise details and a large quantity of direct quotes from the opinion are necessarily included in the treatment of the decision itself.

15. Brief for the Petitioner in the Supreme Court of the United States at 4-5 n.2, *Rummel v. Estelle*, 445 U.S. 263 (1980) [hereinafter cited as *Petitioner's Brief*]. Shaw originally agreed to release Rummel from any claims concerning the checks, but he later changed his mind, triggering Rummel's fate. *Id.*

16. TEX. PENAL CODE ANN. § 31.03(d)(3) (Vernon Supp. 1980-1981); see 445 U.S. at 295.

17. Tex. Penal Code Ann. arts. 1413, 1421 (Vernon 1953).

18. *Id.* arts. 996 (Vernon 1961), 1555b(4)(d) (Vernon Supp. 1973).

19. "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.* art. 63 (Vernon 1952). This statute has been recodified, with minor changes, as TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).

20. Tex. Penal Code Ann. art. 1421 (Vernon 1953).

21. 445 U.S. at 280. This figure is based on Texas's system of "good time credits." In oral argument the Texas attorney general claimed that parole release was so "overwhelming in his case that it is virtually impossible [that he will serve a life sentence]." Oral Argument, *supra* note 1, at 25. He also reported to the Court that Rummel was a prison "trustee," a fact that could reduce his prison sentence to 9½ years. *Id.* at 29-30. Such good time credits, however, may be revoked at any time, in a system "that has a free giving and taking of the good time." *Id.* at 30.

22. 509 S.W.2d 630 (Tex. Crim. App. 1974).

denied without hearing.²³ He sought habeas corpus relief in the federal district court, claiming that his punishment was grossly disproportionate and therefore in violation of the eighth amendment. The district court also denied his petition without hearing.²⁴ The Fifth Circuit Court of Appeals, however, reversed the district court ruling.²⁵ Although a panel of the court concluded that enhanced punishment was appropriate, it found the life sentence to be "grossly disproportionate to [any] rational penological objective"²⁶ served in the case.

The Fifth Circuit, sitting en banc, vacated the panel opinion, and in an eight-to-six decision affirmed the district court's denial of the petition.²⁷ Treating Rummel's sentence as twelve years in view of the parole possibility, it declared the penalty not "so greatly disproportionate . . . as to be completely arbitrary and shocking to the sense of justice."²⁸

Eight years after Rummel committed the crime of false pretenses, the Supreme Court of the United States approved the life sentence on proportionality grounds.²⁹ Justice Rehnquist, writing for Chief Justice Burger and Justices Stewart,³⁰ White, and Blackmun, initially noted two concessions made by Rummel.³¹ First, he had conceded the general validity of habitual offender statutes that enhance punishment of repeat offenders.³² Secondly, Rummel had conceded the authority of Texas to punish each of his crimes "as felonies, that is, by imprisoning him in a state penitentiary."³³ Therefore, Justice Rehnquist pointed out, Rummel "could have received sentences totaling 25 years in prison for what he refers to as his 'petty property offenses.'"³⁴ The Court also emphasized that thirty-four other states treated Rummel's third crime as a felony,³⁵ and that "a large number of States authorized significant terms of imprisonment" for Rummel's other crimes.³⁶ In light of Rummel's concessions, the Court framed the issue in controversy to be "the State's authority to impose a sentence of life imprisonment, as opposed to a substantial term of years, for his third felony."³⁷

The Court's holding is not altogether clear. Essentially, however, its reasoning was as follows: (1) the Court is reluctant to review legislatively mandated terms of imprisonment; (2) it will not review such legislation

23. See 568 F.2d 1193, 1195 (5th Cir. 1978).

24. *Id.*

25. 568 F.2d 1193 (5th Cir. 1978).

26. *Id.* at 1198.

27. 587 F.2d 651 (5th Cir. 1978) (en banc).

28. *Id.* at 655 (quoting *Rogers v. United States*, 304 F.2d 520, 521 (5th Cir. 1962)).

29. 445 U.S. 263 (1980). But see note 5 *supra*.

30. Justice Stewart also wrote a one paragraph concurrence in which he reiterated his belief that the Texas law was unenlightened. 445 U.S. at 285.

31. *Id.* at 268.

32. *Id.*

33. *Id.*

34. *Id.* at 269.

35. *Id.*

36. *Id.* at 269-70.

37. *Id.* at 270-71.

unless it can do so by application of objective factors that result in a bright line conclusion of gross disproportionality; (3) sufficient bright line objectivity was absent in this case; therefore, (4) Texas could constitutionally punish recidivist Rummel as it did.

The Court developed the first two arguments on the grounds of precedent. It conceded that on occasion it had "stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime."³⁸ It observed, however, that the proportionality proposition had in recent years more frequently appeared in death penalty cases.³⁹ Because the Court had repeatedly spoken of the death penalty as unique in kind compared to any sentence of imprisonment, regardless of length, it decided that eighth amendment death penalty decisions were only of limited assistance in Rummel's noncapital claim.⁴⁰

In noncapital cases, the Court observed, "successful challenges to the proportionality of particular sentences have been exceedingly rare."⁴¹ The Court's discussion focused on *Weems v. United States*,⁴² the first opinion to hold that the eighth amendment had a proportionality component. In *Weems* the defendant was a Philippine public official convicted of falsifying two items on official documents. Under the Philippine statute in question, a twelve-year-and-one-day prison sentence was mandated for one falsification. Falsification of an entire document allowed a twenty-year prison sentence. There was no adaptable relation for intermediate cases. The statute required neither proof of injury, nor a demonstration of a desire for gain on behalf of the actor. The sentence under the law necessarily also included certain "accessories": hard labor, wrist and ankle chains, life-time surveillance, and perpetual disqualification from office. Weems received a fifteen-year prison sentence along with the accessories. The United States Supreme Court declared such punishment unconstitutional under the proportionality doctrine.⁴³

Speaking for the majority in *Rummel*, Justice Rehnquist stated that *Weems*'s finding of disproportionality could not be "wrenched" from the "extreme" and "peculiar" facts of that case:⁴⁴ "the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the 'accessories' included within the punishment."⁴⁵ Rejecting the argument that the length of imprisonment, by itself, was a sufficient basis for the result, Justice Rehnquist noted that, as with the death penalty decisions, the uniqueness of the punishment ex-

38. *Id.* at 271.

39. *Id.* at 272.

40. *Id.* The Court attempted to undercut the decisions even further by taking note of the fact that the prior death penalty opinions it cited were plurality or dissenting statements. *Id.*

41. *Id.*

42. 217 U.S. 349 (1910).

43. *Id.* at 382.

44. 445 U.S. at 274.

45. *Id.*

plained the case.⁴⁶

The *Rummel* majority observed that in the past it had demonstrated its "reluctance to review legislatively mandated terms of imprisonment."⁴⁷ Quoting *Coker v. Georgia*,⁴⁸ the Court noted that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."⁴⁹ In *Coker* capital punishment for the crime of rape made it possible to draw a "bright line";⁵⁰ in *Weems* the accessories made it possible for the Court to enforce the eighth amendment "in an objective fashion."⁵¹ Such cases resulted in lines "considerably clearer"⁵² than any constitutional comparison between two differing terms of imprisonment. Justice Rehnquist warned that "a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature" would be difficult to reconcile with the antisubjectivist views expressed in *Coker*.⁵³ The Court observed, therefore, in what shall hereinafter be called the "without fear of contradiction" statement, that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."⁵⁴ In its footnote 11 explaining this statement, however, the Court said without further elaboration that "[t]his is not to say that a proportionality principle would not come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment."⁵⁵

In order to reinforce its interpretation of prior case law, the Court pointed to two post-*Weems* decisions in which noncapital decisions were found not to violate the eighth amendment. In 1912 in *Graham v. West Virginia*,⁵⁶ a case "factually indistinguishable"⁵⁷ from *Rummel*'s claim, the "Court did not tarry long on Graham's Eighth Amendment claim,"⁵⁸ declaring the use of the habitual offender law in that case constitutional. In *Graham* the petitioner was sentenced to life imprisonment for two thefts of horses and one burglary for the purpose of theft of horses, in which the

46. *See id.*

47. *Id.*

48. 433 U.S. 584 (1977).

49. *Id.* at 592.

50. 445 U.S. at 275. The term "bright line" in a proportionality context was apparently used first in the concurring opinion of Justice Powell in *Coker v. Georgia*, 433 U.S. 584, 603 (1977). It was used again in the concurring opinion of Justice Blackmun in *Lockett v. Ohio*, 438 U.S. 586 (1978).

51. 445 U.S. at 275.

52. *Id.*

53. *Id.*

54. *Id.* at 274 (footnote omitted).

55. *Id.* at 274 n.11.

56. 224 U.S. 616 (1912).

57. 445 U.S. at 276.

58. *Id.* (footnote omitted).

value of the booty was \$310. In the 1916 case of *Badders v. United States*⁵⁹ the Court unanimously rejected a proportionality challenge to concurrent sentences of five years imprisonment and \$7,000 in fines for seven counts of mail fraud. The Court in *Badders* said that there was no basis for declaring the punishment unconstitutional.⁶⁰

Justice Rehnquist argued that Rummel had not provided sufficient objective criteria to prove the unconstitutionality of his sentence. Rummel had applied three factors traditionally used in such cases.⁶¹ First, he claimed the pettiness of the offense mandated a lesser penalty.⁶² Secondly, on the basis of intrajurisdictional analysis, he argued that in Texas more serious crimes received less severe punishment.⁶³ Thirdly, using an interjurisdictional approach, he showed that all but two other states would have punished him less severely.⁶⁴

Rummel attempted to characterize his crimes as petty because they were nonviolent and involved only small amounts of money, but the Court rejected this argument. The Court observed that a distinction based on violence "does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal,"⁶⁵ that many nonviolent crimes are nonetheless serious,⁶⁶ and that some nonviolent crimes might reasonably merit greater punishment than some violent ones.⁶⁷ Suggesting that some murders are not violent, as when they are committed by poison,⁶⁸ the Court emphasized that such nonviolence never merits lesser punishment. A line drawn on the basis of the amount of money stolen was also viewed by Justice Rehnquist as subjective:

[T]o recognize that the State of Texas could have imprisoned Rummel for life if he had stolen \$5,000, \$50,000, or \$500,000, rather than the \$120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed "subjective," and therefore properly within the province of legislatures, not courts.⁶⁹

The Court also observed that if Rummel had failed to defraud his victims, he would have been no less blameworthy than if he had succeeded.⁷⁰

59. 240 U.S. 391 (1916).

60. *Id.* at 394.

61. *See, e.g.,* *Coker v. Georgia*, 433 U.S. 584 (1977) (application of seriousness of offense and interjurisdictional approaches); *Weems v. United States*, 217 U.S. 349 (1910) (application of intrajurisdictional and interjurisdictional approaches, noted immediately *infra* in text); *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1974) (application of all three tests); *In re Grant*, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976) (application of all three tests); *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (application of all three approaches); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972) (application of all three tests).

62. 445 U.S. at 275-76.

63. *See id.* at 282-83 n.27. *See also* Petitioner's Brief, *supra* note 15, at 45-47.

64. 445 U.S. at 279.

65. *Id.* at 275.

66. *Id.*

67. *Id.* at 282-83 n.27.

68. *Id.*

69. *Id.* at 275-76.

70. *Id.* at 276.

The Court rejected the intrajurisdictional approach because it requires evaluation of the comparative seriousness of crimes, and such a process is inherently speculative, because seriousness of crimes "is not a line, but a plane."⁷¹ After putting aside "punishments different in kind from fine or imprisonment . . . there remains little in the way of objective standards" for evaluating the proportionality of "a life sentence imposed under a recidivist statute for several separate felony convictions not involving 'violence.'" ⁷² Quoting Justice Frankfurter, Justice Rehnquist reiterated that "severity of punishment, . . . [and] its efficacy or its futility, . . . are peculiarly questions of legislative policy."⁷³

The court also did not find Rummel's interjurisdictional argument entirely convincing.⁷⁴ It conceded that Rummel's detailed charts and tables documenting recidivist laws in the United States demonstrated that he would have received more lenient treatment in all but two other states.⁷⁵ Other statutes imposed mandatory life imprisonment only on the fourth, rather than the third, offense, or only if one or more of the three felonies was violent, while others made life imprisonment discretionary on the third offense.⁷⁶ These distinctions, however, were viewed as "subtle rather than gross."⁷⁷ Rummel's charts did not begin to reflect the full complexity of the comparison that Rummel encouraged the Court to make.⁷⁸ The Court observed that Rummel was eligible for parole consideration in "as little as [twelve] years."⁷⁹ Agreeing that his inability to enforce any right to parole precluded the Court from treating the sentence as one of twelve years, it nonetheless "could hardly ignore . . . the possibility of parole, however slim."⁸⁰ Further complicating the calculus was the role of prosecutorial discretion that is used in any recidivist scheme to exclude deserving cases.⁸¹ The Court said that these considerations were not inherent flaws in the interjurisdictional analysis, but rather served "as illustrations of the complexities confronting any [reviewing] court."⁸² Moreover, the Court stated that even if it assumed that Texas had the most severe punishment in the country, this fact would not render the punishment disproportionate. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."⁸³ In a footnote the Court also observed the absence of another type of objective evidence used in prior cases, namely "contemporary expression of leg-

71. *Id.* at 282-83 n.27.

72. *Id.*

73. *Id.* (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)).

74. 445 U.S. at 279.

75. *Id.*

76. *See id.* at 279-80 nn.19-21.

77. *Id.* at 279.

78. *Id.* at 280.

79. *Id.*

80. *Id.* at 281.

81. *Id.*

82. *Id.*

83. *Id.* at 282.

islative or public opinion on the question of what sort of penalties should be applied to recidivists, or to those who have committed crimes against property."⁸⁴ The Court concluded that any move to lighter sentences "must find its source and its sustaining force in the legislatures, not in the federal courts."⁸⁵ It stated that Texas is entitled to make its own judgment of where to draw the line between felony and petty larceny, "subject only to those strictures of the Eighth Amendment that can be informed by objective factors."⁸⁶ It expressly left open the question, however, of whether Rummel's last crime of receiving \$120.75 by false pretenses could result in a life sentence.⁸⁷ As for recidivist laws,

[T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society By conceding the validity of recidivist statutes generally, Rummel himself concedes that the State of Texas, or any other State, has a valid interest in so dealing with that class of persons.⁸⁸

Justice Rehnquist concluded that the point at which a criminal becomes a recidivist, and how much one may be punished for it, like the line between felony and misdemeanor larceny, are "largely within the discretion of the punishing jurisdiction."⁸⁹

Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented. He rejected Justice Rehnquist's historical claim that the proportionality clause was less applicable in noncapital cases. To Justice Powell the doctrine is equally applicable in cases involving length of imprisonment; therefore, the Court should have analyzed "the nature and number of offenses committed and the severity of the punishment inflicted upon the offender."⁹⁰ The majority should have focused on whether a person deserves such punishment and "not simply on whether punishment would serve a utilitarian goal."⁹¹ Justice Powell did state, however, that recidivists could be more severely punished than first-time offenders.⁹² Justice Powell would have applied the three traditional proportionality tests to the facts of the case and would have concluded that in combination they demonstrated the gross disproportionality of Rummel's life imprisonment sentence. Rummel's sentence would "be viewed as grossly unjust by virtually every layman and lawyer."⁹³ As the state did not attempt to justify the sentence as necessary either on grounds of general or of specific deter-

84. *Id.* at 280 n.22.

85. *Id.* at 284.

86. *Id.*

87. *Id.* at 276.

88. *Id.*

89. *Id.* at 285.

90. *Id.* at 288 (Powell, J., dissenting).

91. *Id.*

92. *Id.* at 301.

93. *Id.* at 307.

rence,⁹⁴ in Justice Powell's opinion the line drawn by Texas was irrational⁹⁵ and in violation of the eighth amendment.

III. RUMMEL IN CONTEXT

William Rummel believed that his sentence of life imprisonment in a Texas prison was grossly disproportionate to the severity of the three crimes that served as the basis for his sentence and argued that as a result his sentence violated the eighth amendment proscription against cruel and unusual punishment. Discussion of the validity of this claim and the propriety of the Court's rejection of that argument cannot be understood without first putting the issue in its philosophical and legal context.

A. *Philosophical Context*

1. *The Principle of Personhood.* In the United States, and in Anglo-American law generally, we tenaciously hold to the ethical view that we, as human beings, are unique entities, different as a species from other animals and different from inanimate objects. As a result of this difference and believed superiority, we feel we are entitled to be treated better than animals and machines. If we are treated like them our rights as persons have been violated. This view of human rights may be identified in the law as the "principle of personhood."⁹⁶ We come to this belief because humans, unlike animals or machines, are thought to be capable of feeling and expressing emotions of a sophisticated nature, such as love, loyalty, and mercy. As a species we are also capable of making rational choices. We have free will. We are not programmed to act as we do. We are not ruled largely by instinct. Because of our choice-making capabilities, humans are also individually unique. We are not fungible. Each of us will respond to stimuli differently; each of us has a different personality. We want the law, therefore, to allow people to act like humans. That is, laws should ensure the freedom of persons to express feelings, to further their creative desires, and to express their unique personalities. Likewise, we want the law to treat us as humans, to treat us as unique personalities, capable of emotions, and inherently different from, and better than, all other living things and all inanimate objects.

Many features of American common and constitutional law are consistent with the principle of personhood. The personhood principle is at work in classical contract law theory, which rests on the premise that persons can, and should be allowed to, make rational complicated choices

94. *Id.* at 302.

95. *Id.* at 307.

96. This concept was developed, although with use of different terminology and in a slightly different context, in Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968). See also J. RAWLS, A THEORY OF JUSTICE (1971); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-3 (1978); Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979). The author's views on this matter follow most closely the ideas of Morris, *supra*.

regarding the ordering of their lives.⁹⁷ The first and fourth amendments to the Constitution have been held to protect different aspects of the human right of privacy, partially because such privacy is necessary to further each person's unique personality and to allow expression of unique human emotions, such as love and caring.⁹⁸ The due process clause requires that government treat its citizens, even those suspected of crime, in a fashion that respects their human dignity.⁹⁹ It also often requires that persons be judged and evaluated as individuals and not as members of larger groups.¹⁰⁰ In other words, justice should be distributed personally, not collectively. Blame, and credit, should be individualized. Thus, laws that irrebuttably presume the existence of a characteristic in a person on the basis of that person's membership in a larger group are often held invalid, even if most members of the group do possess that characteristic.¹⁰¹ This concept of "distributive justice"¹⁰² is also found, as discussed later, in the common law of crimes.¹⁰³

Of course, the principle of personhood and the resultant concept of distributive justice cannot stand if the initial premise that we differ from animals and objects is wrong, and this premise is false if in fact we lack free will and if determinists are correct when they claim that our actions and feelings are no more free than those of animals or machines. Theologians, philosophers, and scientists continue to debate this question, but the law does not. It conclusively rejects determinism.¹⁰⁴

Early shapers of the law may have rejected determinism because of their own principled beliefs.¹⁰⁵ Today, however, the rejection of determinism is viewed by some as an acceptable legal fiction.¹⁰⁶ If determinists are correct, we can and must be treated like puppets, because we are no different

97. See L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-24 (1965).

98. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 195, 50 S.E. 68, 70 (1905); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964); Stone, *The Scope of The Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUNDATION RESEARCH J. 1193, 1207; Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 205 (1890); Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1474 (1973). See also L. TRIBE, *supra* note 96, § 15-21, at 985-90.

99. *Rochin v. California*, 342 U.S. 165 (1952).

100. Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 401 (1977).

101. See, e.g., *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Cleveland Bd. of Educ. v. La-Fleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972). See generally Perry, *supra* note 100, at 406-13.

102. The concept of distributive justice was first developed by Aristotle. See ARISTOTLE, *NICHOMACHEAN ETHICS*, Book V, ch. 3, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1006 (R. McKeon ed. 1941).

103. See text accompanying notes 124-39 *infra*.

104. *United States v. Ceccolini*, 435 U.S. 268, 282 (1978) (Burger, C.J., concurring) (quoting *Blocker v. United States*, 288 F.2d 853, 865 (D.C. Cir. 1961)).

105. E.g., 1 M. HALE, *PLEAS OF THE CROWN* 14 (London 1736) ("Man is naturally endowed with these two great faculties, understanding and liberty of will . . .").

106. Silverman, *Determinism, Choice, Responsibility and the Psychologist's Role as an Expert Witness*, 24 AM. PSYCH. 5, 6 (1969).

from puppets. Determinism negates moral responsibility.¹⁰⁷ This negation means that involuntary incarceration of the blameless would be justifiable. Determinism would result in "overthrow of the basic principles that make our free society possible."¹⁰⁸ In short, we accept the premise that humans possess autonomy because that is what we want to believe.¹⁰⁹ We want to be treated as humans.

2. *Utilitarianism and Retributivism.* While the position of the law regarding free will versus determinism is relatively clear, this lucidity is not to be found in the common law treatment of the competing rationales of the criminal law, utilitarianism and retributivism, and their relationship to the principle of personhood. Early scholars and courts placed too great a focus on the purposes of the criminal law and too little on its limits, and therefore the law did not expressly demonstrate an awareness of the principle of personhood and the concept of distributive justice included within it.¹¹⁰

The danger to the principle of personhood in criminal law doctrine can be appreciated by remembering the premises of the two contrasting philosophies underlying the law of crimes. Utilitarians believe that the sole purpose of the law is to augment the total happiness of the society and to diminish its total pain. Both crime and its punishment are painful and undesirable. As little punishment as necessary to prevent greater pain (*i.e.*, crime) should be inflicted on persons.¹¹¹ Utilitarianism, therefore, is forward looking.¹¹² Prior crime merits future punishment only to the extent that such punishment results in greater future good. This result will occur when persons make, as they will, rational choices to forego the benefits of crime because the pain of punishment is greater.

Retributivism, on the other hand, is backward looking. Punishment is justified by the wrongdoing itself, regardless of its future efficacy.¹¹³ The wrongdoer is a free moral agent, someone who has chosen to commit the antisocial act. By his willed decision he has destroyed the moral equilibrium of society and unjustly enriched himself at society's expense. His voluntary decision therefore gives society the right to punish the person.¹¹⁴

107. Branden, *Free Will, Moral Responsibility and the Law*, 42 S. CAL. L. REV. 264, 265 (1969).

108. Nord, *The Mental Element in Crime*, 37 U. DET. L.J. 671, 698 (1960).

109. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968).

110. Dubin, *supra* note 96, at 346; Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 U.C.L.A. L. REV. 293, 294 (1975).

111. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION IN THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 843 (Burt ed. 1939); H. PACKER, *supra* note 109, at 39; Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3, 5 (1955).

112. Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17, 21 (1979). See also Fletcher, *supra* note 110, at 302 (instrumentalism); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 847 (1972).

113. Rawls, *supra* note 111, at 4-5.

114. The right need not always be exercised. H. HART, *PUNISHMENT AND RESPONSIBILITY* 236 (1968); Morris, *supra* note 96, at 478. See also J. KLEINIG, *PUNISHMENT AND DESERT* 89 (1973).

Punishment returns society to its equilibrium¹¹⁵ and the actor to his moral position in society, once again entitled to take advantage of its benefits.

Adherents of each philosophical view are legion. Early common law was usually premised on retributivism; later, the utilitarian approach predominated.¹¹⁶ More recently, new support for retributivism has surfaced.¹¹⁷ Largely, however, the new support is the result of a growing realization that the general justifying aim of the criminal law and its punishment can and must be distinguished from the distribution of the law's punitive features. Professor Hart first emphasized distributive justice, the question of who should be punished and how much the punishment should be, as an issue independent from the general justifying aim of the criminal law. He argued that one could favor utilitarianism as the general justifying aim, while favoring retribution in distribution.¹¹⁸

The importance of establishing this dichotomy lies in the fact that utilitarianism, although it may logically explain why society criminalizes certain conduct, conceivably suffers from the same evil as determinism:¹¹⁹ the potential violation of the principle of personhood. Utilitarians treat persons as means to other ends. Individuals may be sacrificed for the impersonal common good. In the proper circumstances utilitarianism justifies the punishment of innocent people who have committed no social harm and who do not intend to commit such harm.¹²⁰ It also can result in incarceration of persons before they commit any antisocial act, based on their propensities to commit dangerous acts.¹²¹ Such imprisonment of innocent persons and of persons with dangerous propensities, however, violates the human dignity principle of personhood. Humans should be punished because they act wrongfully, because they deserve punishment, not because their punishment will serve some other end and not because they might do something wrong in the future. Retribution only justifies punishment when the person has in fact acted in an antisocial fashion. Retributivists believe that the antisocial actor deserves to be punished because he is a free moral agent who has chosen his own fate and because he is entitled to pay his price to the society so he may be returned to society as a full partner in it. Retribution is consistent with the concept of human dignity implicit in the principle of personhood. The focus is on the person and his act and not on some speculative future event. The person is dignified by the acknowledgment of his free will, and he is respected enough to

115. A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 47-49 (1976); Morris, *supra* note 96, at 478.

116. Morris, *Introduction*, 13 MCGILL L.J. 534, 546-49 (1967); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1050 (1978).

117. See, e.g., von Hirsch, *Giving Criminals Their Just Deserts*, 3 CIV. LIB. REV., Apr.-May 1976, at 23.

118. H. HART, *supra* note 114, at 8-13.

119. Morris, *supra* note 116, at 539.

120. G. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.3.2, at 415 (1978); McCloskey, *An Examination of Restricted Utilitarianism*, 66 PHILOSOPHICAL REV. 466, 468 (1957).

121. See H. PACKER, *supra* note 109, at 77-78; von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 746 (1972).

be reestablished in moral equilibrium in society. The process of punishment occurs not just because it may be good for society but because it is fair to the person.

Just as the principle of personhood is a part of other aspects of the common and constitutional law, it is without question a part of the common law of crimes in the form of the retribution theory. Because of the focus of the common law courts on the purposes and not the limits of the criminal law,¹²² however, one finds little or no expression of the principle of personhood, as such, in substantive criminal law. Nevertheless, the courts seem to have acted largely with an intuitive sense of the principle.¹²³ Most of criminal law doctrine is best explained by recourse to the idea of personhood. The common law requirement of a voluntary act resulting in social harm,¹²⁴ for example, is far more easily justified in retributive than utilitarian fashion. It ensures that a person will not be punished for his propensity or as an object lesson, but only if he has made a choice to act out his criminal propensities. As such, this rule is not only nonutilitarian, but is potentially antiutilitarian.¹²⁵

The common law requirement of *mens rea*¹²⁶ is also more consistent with the principle of personhood than with utilitarian values.¹²⁷ As a general proposition only utilitarianism is consistent with strict liability legislation. Several utilitarian reasons for strict liability legislation exist. First, an innocent actor may be accident prone, dangerous, and in need of incarceration. Secondly, the absence of a general requirement of *mens rea* may serve to make law-abiding persons more careful than in a system based on *mens rea*. Thirdly, the absence of a *mens rea* requirement relieves the government of proving a difficult concept, thereby ensuring that those who do act with improper motive are convicted. Fourthly, those who might commit a crime believing they can avoid conviction by proving lack of *mens rea* will be deterred by strict liability rules, as this defense is then lost to them. Punishment for violation of strict liability crimes and of persons

122. See note 110 *supra* and accompanying text.

123. Dubin, *supra* note 96, at 378. Although Dubin was writing about the Supreme Court, the author believes that the common law courts are more deserving of the compliment.

124. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 177 (1972); R. PERKINS, *CRIMINAL LAW* 546 (2d ed. 1969). See generally G. FLETCHER, *supra* note 120, § 6.4; J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 171-246 (2d ed. 1960); H. PACKER, *supra* note 109, at 73-79.

125. See generally H. PACKER, *supra* note 109, at 73-79.

126. Although ancient common law did not require a *mens rea*, W. LAFAVE & A. SCOTT, *supra* note 124, at 192; R. PERKINS, *supra* note 124, at 739, it has been required since about 1600. *Id.* Excellent articles have been written that describe or defend this historical requirement. See, e.g., Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043 (1958); Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980); Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

127. Some utilitarian justifications, however, do exist for the rule. For example, one who lacks a criminal disposition is not in need of reformation. Similarly, specific deterrence of such persons is unnecessary as they do not need to be intimidated or incapacitated. One commentator has claimed that general deterrence fails as to innocent actors. G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 14, at 30 (2d ed. 1961).

who lack a statutorily required mens rea is antipathetic to retributive principles.¹²⁸ Although mens rea should be required to ensure that only those deserving of punishment are punished, the requirement frustrates the utilitarian incarceration of innocent but dangerous persons.

Finally, defenses such as insanity and duress are often counterutilitarian.¹²⁹ These excuses exculpate persons who commit socially harmful acts, but who suffer from internal circumstances that substantially reduce their choice-making capabilities. Although such defenses can serve a partial utilitarian purpose,¹³⁰ they mainly serve the retributive goal of exculpating the blameless:¹³¹ those who suffer from so severe a disease that they lack the required mental state for the crime or the volitional or cognitive mechanisms necessary to perform a willed act, and those who act as a result of an imminent threat that renders that person's conduct nearly involuntary. Partial defenses,¹³² as well, are retributivist, not utilitarian. One such common law partial defense, diminished capacity,¹³³ was largely an effort by the courts to ensure that punishment of the sane but severely diseased actor approximated his degree of culpability.¹³⁴ Provocation, too, is a common law means¹³⁵ to make punishment more nearly proportionate to blameworthiness.¹³⁶

The traditional common law distinction between civil and criminal sanction for antisocial acts is also largely the result of the principle of personhood. In both cases a person is involuntarily committed. The society, however, views the two systems differently. The criminal process involves punishment and blame; the civil process theoretically implicates treatment without moral blame.¹³⁷ This distinction exists because our collective con-

128. It is impossible to justify the imposition of moral blame in the absence of mens rea. The mens rea of negligence, although not subjective, can be a legitimate basis for moral blame if the actor had the capacity to act more carefully. Fletcher, *supra* note 13, at 415-18.

129. H. PACKER, *supra* note 109, at 112; Dubin, *supra* note 96, at 341.

130. For example, since one cannot deter the insane, the insanity defense is consistent with the utilitarian good of specific deterrence. G. FLETCHER, *supra* note 120, § 10.3.5, at 813; H. HART, *supra* note 114, at 40; H. PACKER, *supra* note 109, at 109.

131. G. FLETCHER, *supra* note 120, § 10.3.1, at 799-800.

132. A defense is partial if a person remains punishable, but of a lesser crime or degree of crime. In a sense, however, such defenses are total. Provocation, for example, *discussed at* notes 135-36 *infra* and accompanying text, results in the reduction of the punishable crime from murder to manslaughter. The partial defense is total in that it serves as a complete acquittal of murder.

133. Diminished capacity, as such, has been recognized as a partial defense by various courts. *See generally* W. LAFAVE & A. SCOTT, *supra* note 124, at 325-32.

134. *See, e.g.*, *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

135. For a discussion of its origins and rationale, see 2 J. BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* § 697 (8th ed. 1892); 4 W. BLACKSTONE, *COMMENTARIES* *184-93; 1 O. WARREN & B. BILAS, *WARREN ON HOMICIDE* §§ 85, 90 (perm. ed. 1914); 1 F. WHARTON, *A TREATISE ON CRIMINAL LAW* §§ 422, 424-425 (11th ed. 1912); Ashworth, *The Doctrine of Provocation*, 35 *CAMBRIDGE L.J.* 292 (1976).

136. Without the doctrine, the common law actor was subject to the death penalty. *See* Ashworth, *Sentencing in Provocation Cases*, 1975 *CRIM. L. REV.* 553. The law takes cognizance of human frailty. Moreland, *Re-Examination of the Law of Homicide in 1971: The Model Penal Code*, 59 *KY. L.J.* 788, 805 (1971).

137. Hart, *supra* note 13, at 405-06; Morris, *supra* note 96, at 483.

science does not countenance punishment when it cannot impose blame.¹³⁸ To treat the sick as if they were moral wrongdoers is cruel. Likewise, however, the bad should not be treated as if they are mad because this approach implies that all antisocial actors are sick and therefore not free moral agents.¹³⁹ Utilitarians blur this distinction because they are interested only in lessening antisocial behavior, which both civil commitment and criminal incarceration may accomplish.

3. *Distributive Justice and Proportionality.* Criminal law doctrine is thus generally framed in a fashion consistent with the principle of personhood.¹⁴⁰ That principle includes a requirement that justice be distributed on individual, not collective, grounds. A brief but closer look at this latter concept of distributive justice within the context of the principle of personhood is necessary.

First, distributive justice is consistent with retributive rather than utilitarian principles because the principle of personhood requires that justice to the individual not be subordinated to societal efficiency.¹⁴¹ Distributive justice, therefore, is a core feature of the criminal law either because retribution is its general justifying aim or, pursuant to Hart's more realistic thesis, it is a limit on utilitarian goals.¹⁴² Secondly, as a limit on utilitarianism, distributive justice requires that punishment be inflicted only on morally guilty persons, that is, persons who have acted to cause a result deserving of blame and who are also personally deserving of blame because they acted of their own free will.¹⁴³ Thus, both act and actor must be morally blameworthy. Thirdly, "[e]ven a vicious criminal, fairly convicted, ought not to be thought an outcast subject to any and all abuse."¹⁴⁴ In short, desert is more than just a prerequisite to punishment, it is a yardstick for punishment. A core feature of the distributive justice concept of the principle of personhood is that punishment be proportionate to that person's personal guilt.¹⁴⁵ Otherwise, the society could use an act of social disobedience as a basis to treat the person as a nonhuman forever. Although the guilty actor merits punishment and the innocent does not, pun-

138. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

139. See *Morris*, *supra* note 96, at 486-90. See also *Morris*, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 520 (1968).

140. There are various violations of this general premise: the "moral wrong doctrine"; the lack of a defense for reasonable mistake or ignorance of the criminal law; the felony-murder rule; and various aspects of accessorial and conspiratorial law such as the rule of liability for the unintended but natural and probable consequences of one's assistance. See *W. LAFAVE & A. SCOTT*, *supra* note 124, at 360-65, 516-17.

141. See *J. RAWLS*, *supra* note 96, at 69; *Coffee*, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1090 (1978).

142. *H. HART*, *supra* note 114, at 9.

143. *G. FLETCHER*, *supra* note 120, § 6.3.2, at 415-16; *R. SINGER*, *JUST DESERTS* 32 (1979); *Wheeler*, *supra* note 112, at 846.

144. *Goldberg & Dershowitz*, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1802 (1970).

145. *G. FLETCHER*, *supra* note 120, § 6.3.2, at 415-16; *von Hirsch*, *supra* note 117, at 26-28. See also *ARISTOTLE*, *supra* note 102 ("[T]he unjust is what violates the proportion.").

ishment beyond his guilt is similar to punishing the innocent, because it involves punishing the innocent part of that person.¹⁴⁶ To do so neither brings society back to its proper equilibrium nor returns the actor to society, both of which are essential features of retribution and of the principle of personhood. Punishment beyond the guilt involved is not fair punishment as defined by the personhood concept, but is personally unfair expedient punishment.¹⁴⁷

Although utilitarianism has a proportionality component, the proportionality involved in the principle of distributive justice is retributive. The difference is significant. Retributive proportionality requires that punishment fit the moral egregiousness of the crime, taking into consideration the harmfulness of the act and the personal blameworthiness of the actor.¹⁴⁸ Utilitarian proportionality, on the other hand, requires only that punishment be no more severe than is required to fulfill its deterrent goal.¹⁴⁹ So viewed, punishment is calibrated to the harmfulness of the act, without any necessary consideration of the personal characteristics of the actor, except to the extent that specific deterrence is at issue,¹⁵⁰ and even then the issue is not the moral blameworthiness of the actor, but only his or her propensity for future crime. Moreover, the harmfulness of the act is viewed differently by a utilitarian than by a retributivist. The former looks not just at the individual act and its immediate consequences, but to its general mischievousness. To a utilitarian, a crime that is not easily deterred, though it may involve only minor social harm, merits more severe punishment than a more serious but more easily deterred crime because the utilitarian aim is to reduce the overall amount of crime rather than to distribute punishment in a given case in relation to immediate social harm. The punishment might therefore be higher for drunk drivers than for intentional killers and yet be theoretically proportionate in utilitarian terms.¹⁵¹ Retributive proportionality rejects such a result.

These philosophical roots underlie the law, particularly the common law of crimes. Although this basis does not mean, of course, that the principle

146. N. MORRIS, *THE FUTURE OF IMPRISONMENT* 75 (1974).

147. From a purely philosophical point of view, of course, one can defend retributively disproportionate punishment. One can simply reject the principle of personhood in favor of pure utilitarianism. Alternatively, one can define justice as meaning that one should not suffer retributively disproportionate punishment except when necessary to prevent a greater societal harm. Goldman, *The Paradox of Punishment*, 9 *PHILOSOPHY & PUB. AFFAIRS* 42, 52 (1979). So defined, however, justice still has a meaning contrary to the principle of personhood. Proportionality becomes nothing more than a presumptive rule. Utilitarian values supersede it. Proportionality does not limit utilitarianism; utilitarianism limits the proportionality doctrine by expanding punishment. This type of justice is not based on the personhood principle. Rather, unjust punishment is obligatory for purposes of expediency. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 *INQUIRY* 249, 251 (1965); Wheeler, *supra* note 112, at 847. Although expedient, this approach to justice is not justifiable if one accepts the principle of personhood as the primary moral principle of our society. *See also* notes 152, 346-48 *infra* and accompanying text.

148. R. SINGER, *supra* note 143, at 17; A. VON HIRSCH, *supra* note 115, at 69.

149. J. BENTHAM, *supra* note 111, at 843-44.

150. *See id.* at 845-46; Wheeler, *supra* note 112, at 848, 851.

151. Wheeler, *supra* note 112, at 851-52.

of personhood is constitutionally required, any judicial interpretation of the eighth amendment that diverges from the principle should be made in full realization that it conflicts with paramount values of human dignity fundamental to American society.¹⁵²

B. *Legal Context*

The Supreme Court has incorporated the principle of personhood in the eighth amendment proscription against cruel and unusual punishment, as it did in first, fourth, fifth, and fourteenth amendment protections.¹⁵³ Three separate lines of cases prior to *Rummel* confirm such a conclusion. The principle is found in the early eighth amendment decisions of the Supreme Court that prohibited as cruel and unusual those forms of punishment deemed barbaric at the time of the framing of the Constitution, such as beheading, disemboweling, and quartering.¹⁵⁴ Although the death penalty was not viewed as unconstitutional,¹⁵⁵ persons sentenced to death were entitled by these decisions to have their lives taken in a fashion that respected their basic personhood, as then understood. The techniques proscribed were those that troubled early Americans as being inhuman, as treating both the executed and the executioner as less than full persons.

A second line of cases not involving torturous executions reinforced the personhood principle. In the early decision of *Weems v. United States*¹⁵⁶ the Supreme Court concluded that the cruel and unusual punishment clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."¹⁵⁷ This conclusion was reaffirmed in 1958 in *Trop v. Dulles*,¹⁵⁸ when the Court said that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man"¹⁵⁹ and that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁶⁰ The Supreme Court has continued to reaffirm this understanding in a third line of cases involving the death penalty, in which the dignity principle has been found to require certain extra

152. See N. MORRIS, *supra* note 146, at 75. The personhood principle, which historically began as a "radical vision of human rights that underlies the Constitution and its view of the criminal law," is one of primary value in the United States. Richards, *supra* note 96, at 1404. It also conforms with feelings many of us express on a daily basis. As already observed, the core of much of American law is consistent with the principle. See notes 97-101, 122-39 *supra* and accompanying text. Nonetheless, some common law rules conflict with this principle. See, e.g., note 140 *supra*. Infliction of disproportionate punishment is also not uncommon. Such violations, however, do not make excessive punishment just, only frequent. See note 147 *supra*. Nor do such practices suggest that the personhood principle is not a deeply held value, but only that society has at times deviated from it.

153. See notes 98-100 *supra* and accompanying text.

154. *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

155. See, e.g., *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

156. 217 U.S. 349 (1910).

157. *Id.* at 378.

158. 356 U.S. 86 (1958).

159. *Id.* at 100.

160. *Id.* at 101.

procedural regularities.¹⁶¹

The Court has demonstrated that its dignity principle is similar to the principle of personhood in two ways. First, its use of language in the cases supports this conclusion. It talks of "human dignity" and "humane justice" and "decency." It does not speak in this context of the rationality of utilitarian philosophy. The eighth amendment is intended to ensure decency—the principle of personhood—not rationality.¹⁶² Secondly, the Court has affirmed the concept of distributive justice.¹⁶³ In *Robinson v. California*¹⁶⁴ the Court declared unconstitutional a statute that made it a crime to be addicted to the use of narcotics. The Court held that the eighth amendment prohibits punishment in which a voluntary act causing social harm is lacking.¹⁶⁵ As drug addiction is an involuntarily contractable disease, its punishment was invalid.¹⁶⁶ The Court also reinforced the importance of retaining the retributive-like difference between criminal and civil commitment. It conceded that a state could civilly commit addicts for utilitarian reasons, but concluded that it could not use the stigmatizing criminal process to incarcerate them.¹⁶⁷ Furthermore, although it had previously avoided such a conclusion,¹⁶⁸ the Court held in *Weems* that "a precept of justice [is] that punishment for crime should be graduated and proportioned to [the] offense."¹⁶⁹ According to this view, excessive punishment is cruel punishment. It is excessive if the punishment either "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."¹⁷⁰ The Court has twice found punishment unconstitutional under the proportionality principle.¹⁷¹

161. *E.g.*, *Adams v. Texas*, 444 U.S. 990 (1979); *Godfrey v. Georgia*, 444 U.S. 897 (1979); *Beck v. Alabama*, 444 U.S. 897 (1979); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

162. *People v. Mosley*, 78 Misc. 2d 736, 358 N.Y.S.2d 1004, 1011 (Monroe County Ct. 1974) (viewed issue as humanistic not legalistic); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964).

163. L. TRIBE, *supra* note 96, § 15-3, at 893 & n.10, interprets *Coker v. Georgia*, 433 U.S. 584 (1977), and *Robinson v. California*, 370 U.S. 660 (1962), as support for what he calls the "right of personhood."

164. 370 U.S. 660 (1962).

165. *Id.* at 666.

166. *Id.* at 667.

167. *Id.* at 666.

168. *O'Neil v. Vermont*, 144 U.S. 323 (1892).

169. 217 U.S. at 367. That proportionality should be viewed as a nonutilitarian concept in the Court's decisions stems from the Court's "decency" language. See note 162 *supra* and accompanying text.

170. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

171. *Coker v. Georgia*, 433 U.S. 584 (1977); *Weems v. United States*, 217 U.S. 349 (1910). Lower court reliance on *Weems* was delayed. Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 67 (1972); see, e.g., *Perkins v. State*, 234 F. Supp. 333 (W.D.N.C. 1964) (20-30-year prison sentence upheld for consensual homosexual act); *State v. Lee*, 166 N.C. 256, 80 S.E. 977 (1914) (9½-year sentence for 11¢ theft not excessive as matter of law). *Weems* was viewed by some as a dead letter. Turk-

C. *Personhood Litigation Not Involving Proportionality*

The principle of personhood requires that only the morally guilty be punished and that they be punished only to the extent of their blameworthiness.¹⁷² *Robinson* narrowly held that only persons who commit voluntary acts causing social harm may be punished,¹⁷³ but its implications could have been broader; the case might have stood for the proposition that only the morally blameworthy may constitutionally be punished. So understood, particularly in conjunction with *Weems*, this interpretation would have meant that (1) punishment of persons who lack a mens rea would be unconstitutional; (2) legislative efforts¹⁷⁴ to repeal common law defenses such as insanity would be constitutionally invalid; and (3) legislative efforts to place the burden of persuasion regarding such defenses on defendants would also be improper.¹⁷⁵

In fact, however, in the nonproportionality area the Court has consistently acted inconsistently, at times taking hesitant steps, at other times giant leaps toward implementing the principle of personhood, always later to retreat from the apparent implications of such prior decisions by deferring to legislatures. The Court has thus never demonstrated sensitivity to the fact that *Weems* and *Robinson* could constitute acceptance of a broad portion of a much larger principle. Not only has the Court been insensitive to the larger issues, but it has often reached poorly crafted decisions and also manifested confusion regarding the jurisprudential doctrine before it. Further, the law has at time been skewed by the lack of interest in, or improper strategy of, lawyers litigating the criminal law issues. The handling of criminal law principles of distributive justice has brought honor upon neither the judiciary nor the legal profession as a whole.¹⁷⁶

The Court's inconsistency is obvious in three lines of cases. In the mens rea area the Supreme Court first upheld the constitutionality of strict liability offenses without serious discussion.¹⁷⁷ Later, in *Morissette v. United*

ington, *Unconstitutionally Excessive Punishment: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 149-50 (1967). Nonetheless, in fairly recent years, even before *Coker* was decided, the doctrine was "born again." See, e.g., cases cited in note 61 *supra*.

172. See notes 143-47 *supra* and accompanying text.

173. See notes 164-67 *supra* and accompanying text.

174. Two such efforts were successful, but ruled unconstitutional by state courts. *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). See § 522 of the proposed Criminal Justice Reform Act of 1975, S. REP. NO. 1, 94th Cong., 1st Sess. (1975), for an additional unsuccessful attempt.

175. The latter result flows from the idea that excuses affect the level of an actor's blameworthiness, see notes 129-36 *supra* and accompanying text, and to the extent that the due process clause is intended to avoid criminal stigmatization of a person unless the state has proven his guilt beyond a reasonable doubt, the state should have to carry the burden of persuasion as to those defenses that acquit the person of moral blame. The author's point is eloquently expressed by Justice Frankfurter in his dissent in *Leland v. Oregon*, 343 U.S. 790, 802 (1952).

176. "[T]he criminal law jurisprudence of the Court remains incomplete, inconsistent, and unpersuasive" Dubin, *supra* note 96, at 378. That description, written in 1966, is even more accurate today.

177. In *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910), the Court reached this

States,¹⁷⁸ in what Professor Herbert Packer considered a possible turning point in judicial attitude toward mens rea,¹⁷⁹ the high court spoke for the first time of mens rea as an ancient requirement,¹⁸⁰ not "provincial or transient,"¹⁸¹ but "universal and persistent in mature systems of law."¹⁸² Later, in *Lambert v. California*,¹⁸³ the Court further intoned that "[a] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."¹⁸⁴ In *Lambert* the Court held unconstitutional under the due process clause the punishment of a woman who was understandably ignorant of a regulatory law that required her to register as a felon. Although *Lambert* seemed to require "a whole volume of the United States Reports . . . to document in detail the legislation in this country that would fall or be impaired,"¹⁸⁵ the opinion turned out to be, as dissenting Justice Frankfurter predicted, "a derelict on the waters of the law."¹⁸⁶ Subsequent cases distinguished *Morissette* and *Lambert*.¹⁸⁷ The result, as Professor Packer put it, is that "[m]ens rea is an important requirement [of criminal jurisprudence], but it is not a constitutional requirement, except sometimes."¹⁸⁸

In the field of criminal defenses, as well, the Court started slowly. In *Fisher v. United States*,¹⁸⁹ for example, it held that the due process clause was not violated by the conviction and death sentence of a black defendant, who was denied a jury instruction that would permit the jury to consider the fact that he suffered from psychopathic aggressiveness, low emotional responses, and borderline mental deficiency, even though he had killed the victim after she had made racial slurs. Later, in *Robinson v. California*,¹⁹⁰ however, the Court treated drug addiction as a nonpunishable condition. The implications of *Robinson* for the law of excuses was obvious. The case seemed logically to require the recognition of the distributive justice principle that the morally blameless not be punished for those acts caused by conditions over which they had no control. Four Justices, including the author of the majority opinion, so understood its holding.¹⁹¹ The extension of the holding to the insanity defense was clear in

conclusion in a dictum. This dictum became law in *United States v. Balint*, 258 U.S. 250 (1922).

178. 342 U.S. 246 (1952).

179. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 121.

180. 342 U.S. 246, 250 (1952).

181. *Id.*

182. *Id.*

183. 355 U.S. 225 (1956).

184. *Id.* at 229 (quoting O. HOLMES, *THE COMMON LAW* 50 (1946)).

185. *Id.* at 232 (Frankfurter, J., dissenting).

186. *Id.*

187. *E.g.*, *United States v. Park*, 421 U.S. 658 (1975) (intent not necessary to convict corporate officer under Federal Food & Drug Act); *United States v. Freed*, 401 U.S. 601, 607-09 (1971) (no scienter required to make constitutionally unlawful the possession of unregistered firearms).

188. Packer, *supra* note 179, at 107.

189. 328 U.S. 463 (1946).

190. 370 U.S. 660 (1962).

191. In *Powell v. Texas*, 392 U.S. 514 (1968), Justice Fortas, joined in dissent by Justices

Justice Douglas's concurring opinion, in which he stated that "[e]ach [the insane person and the drug addict] has a disease and each must be treated as a sick person."¹⁹² Not surprisingly, therefore, *Robinson* was hailed by Professor Amsterdam as the "beginning of a new era of concern for substantive criminal law problems."¹⁹³ Six years later, however, the Court abandoned the logical implications of the *Robinson* reasoning in *Powell v. Texas*,¹⁹⁴ when it upheld the punishment of a chronic alcoholic for being drunk in a public place. Rather than viewing *Robinson* as requiring the recognition of the principle of personhood, the Court limited *Robinson* to its facts,¹⁹⁵ rejecting the argument that "this Court has . . . articulated a general constitutional doctrine of *mens rea*."¹⁹⁶ It distinguished *Robinson*, which it viewed as predicated on the fact that that law punished "a mere status,"¹⁹⁷ from *Powell*, wherein the statute prohibited public conduct that created substantial health and safety hazards. The latter type of statute was held not to violate eighth amendment principles.¹⁹⁸

The same trend is even more dramatically observed in the area of burden of proof. In *Leland v. Oregon*¹⁹⁹ the Court held that a state could place upon a defendant the burden of persuasion regarding the defense of insanity. The dissent decried the result because it "obliterate[d] the distinction between civil and criminal law."²⁰⁰ Later, however, in *In re Winship*,²⁰¹ the dissent's conclusion was cast in doubt when the Court declared that a state must prove beyond a reasonable doubt "every fact necessary to constitute the crime . . . charged."²⁰² The question whether the meaning of the term "fact" included defenses seemed to be answered affirmatively in *Mullaney v. Wilbur*,²⁰³ in which the Court overturned a long-time Maine procedure that required a defendant to carry the burden of persuasion regarding his alleged heat of passion. The Court declared that "*Winship* is concerned with substance rather than . . . formalism."²⁰⁴ Specifically, *Winship* was interpreted as serving to protect the critical inter-

Douglas, Brennan, and Stewart, stated: "*Robinson* stands upon a principle . . . [that] is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567. Justice White had expressed that belief in a dissenting opinion in *Robinson*. "If it is 'cruel and unusual punishment' to convict appellant for addiction, it is difficult to understand why it would be any less offensive . . . to convict him for use" *Robinson v. California*, 370 U.S. 660, 688 (1962).

192. 370 U.S. at 674.

193. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 234 (1967).

194. 392 U.S. 514 (1968).

195. *Id.* at 532-33.

196. *Id.* at 535.

197. *Id.* at 532.

198. *Id.* at 537.

199. 343 U.S. 790 (1952).

200. *Id.* at 806 (Frankfurter, J., dissenting).

201. 397 U.S. 358 (1970).

202. *Id.* at 364.

203. 421 U.S. 684 (1975).

204. *Id.* at 699.

ests of a defendant in the fact-finding process regarding "not only . . . [his] guilt or innocence in the abstract but also . . . [his] degree of criminal culpability."²⁰⁵ As heat of passion affected the latter interest and was historically of great importance in making such a determination,²⁰⁶ the state had to carry the burden of persuasion. The opinion seemed to many to spell the end of affirmative defenses,²⁰⁷ to perhaps require mens rea as a constitutional defense,²⁰⁸ and even to affect the burden of persuasion in civil commitment cases.²⁰⁹ Only two years later, however, the Court narrowed *Mullaney* as *Powell* did *Robinson* and subsequent cases did *Lambert* and *Morissette*. In an opinion clearly inconsistent with *Mullaney*, the Supreme Court in *Patterson v. New York*²¹⁰ admitted that "some language in *Mullaney* . . . has been understood"²¹¹ to require the state to carry the burden of persuasion regarding affirmative defenses, but "[t]he Court did not intend *Mullaney* to have such far-reaching effect."²¹² According to the *Patterson* Court, the state must only carry the burden of persuasion regarding prima facie elements of crimes.²¹³

In each of the three lines of cases, mens rea, criminal defense, and burden of proof, the Court demonstrated its lack of judicial sensitivity to the relevance of the principle of personhood by expressly or impliedly indicating its belief that the issues were more appropriately legislative matters.²¹⁴ The mens rea and criminal defense cases were also poorly crafted, jurisprudentially confused, and aided and abetted by inappropriate adversarial decision-making.²¹⁵

Commentators have criticized the mens rea cases not only as poorly reasoned and poorly crafted, but as "constitutional adjudication at its

205. *Id.* at 697-98.

206. *Id.* at 696.

207. *E.g.*, Allen, *The Restoration of In Re Winship: A Comment on Burdens of Persuasion in Criminal Cases after Patterson v. New York*, 76 MICH. L. REV. 30, 34 (1977); Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L. L. REV. 390, 398 (1976); Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L.J. 871, 878-79 (1976).

208. Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U. L. REV. 775, 790-800 (1973).

209. Comment, *supra* note 207, at 424-30.

210. 432 U.S. 197 (1977).

211. *Id.* at 214-15 n.15.

212. *Id.*

213. *Id.* at 215.

214. *E.g.*, *Patterson v. New York*, 432 U.S. 197, 214-15 n.15 (1977); *Powell v. Texas*, 392 U.S. 514, 533 (1968); *Morissette v. United States*, 342 U.S. 246, 263 (1952); *Fisher v. United States*, 328 U.S. 463, 476 (1946).

215. The burden of proof cases, although not necessarily confused, did seem to demonstrate a particularly low level of awareness of the issues at stake. The *Leland* Court viewed the issue as one merely involving a nonconstitutional burden issue. 343 U.S. 790, 798 (1952). *Patterson*, too, followed a formalistic approach. *See, e.g.*, 432 U.S. at 215. In fact, however, not only is a burden issue often decisive of the outcome, *Speiser v. Randall*, 357 U.S. 513, 525 (1958), but it is also an issue of substantive not merely procedural criminal law. Tushnet, *supra* note 208, at 775-76. It is substantive because in deciding what factors must be proved by whom, one necessarily raises questions of what constitutes the essence of a crime that must be proved by the state. *See* notes 456-66 *infra* and accompanying text.

worst."²¹⁶ Professor Packer has cogently demonstrated that the important constitutional rules were reached without serious consideration by the Court and as a result of extremely poor advocacy by lawyers representing the victims of strict liability offenses.²¹⁷ Moreover, even the *Morissette* opinion was confused about jurisprudential doctrine. It incorrectly claimed mens rea had its roots in utilitarian philosophy rather than retribution, which it incorrectly equated with "retaliation and vengeance."²¹⁸ *Lambert*, a remarkably short opinion, failed to explain how it could be reconciled with the "no constitutional mens rea requirement" rule it repeated.²¹⁹ Moreover, in no mens rea case did either the Court or the parties realize that *Weems's* proportionality doctrine might be relevant. Only Justice Frankfurter, in dissent in *Lambert*, even noted this possibility.²²⁰

The defense cases were similarly jurisprudentially confused, weakly crafted, and victims of unfortunate legal strategy. *Fisher* characterized the issue at bar to be whether diminished capacity was a constitutionally mandated defense²²¹ when in fact, as the dissent realized, it involved no more than the relevance of psychological evidence to negate the prima facie mens rea of murder.²²² *Robinson* was a short and analytically unexplained opinion, even though it was the first opinion to apply the eighth amendment as it did. It failed to cite *Lambert* as support for its result, nor did it cite any prior eighth amendment case, even *Weems*.²²³ Even Justice Douglas's concurrence was confused, as he conceded that the acts of an addict could be punished.²²⁴ Yet he later analogized the insanity defense to Robinson's predicament, thus ignoring the fact that the insanity defense is triggered when a sick person acts out his antisocial thoughts. The viability of the *Robinson* doctrine was also perhaps affected by the choice of Powell as the petitioner in the test case of *Powell v. Texas*.²²⁵ Although he was ably represented,²²⁶ LeRoy Powell was the wrong defendant at the wrong time because his case of compulsive drinking was weak and because, as a middle class alcoholic with a private place to be drunk, his presence in public while drunk was voluntary.²²⁷ With a more suitable

216. Packer, *supra* note 179, at 111. Packer criticizes the decisions as being "egregiously" casual, *id.* at 113; "unsatisfying," *id.*; "flimsy," *id.* at 115; and "unilluminating," *id.* at 131. See also Dubin, *supra* note 96, at 382-83, for similar criticisms.

217. Packer, *supra* note 179, at 111-13, 128-29.

218. *Morissette v. United States*, 342 U.S. 246, 251 (1952).

219. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (Frankfurter, J., dissenting).

220. *Id.* at 231.

221. 328 U.S. 463, 470 (1946). The Court referred to diminished capacity as the theory of partial responsibility.

222. *Id.* at 492 (Murphy, J., dissenting); see Dubin, *supra* note 96, at 379.

223. Justice Douglas, however, cited a number of prior eighth amendment cases in his concurrence. 370 U.S. 660, 676 (1962).

224. *Robinson v. California*, 370 U.S. 660, 674 (1962).

225. 392 U.S. 514 (1968).

226. Merrill, *Drunkness and Reform of the Criminal Law*, 54 VA. L. REV. 1135, 1147 (1968).

227. See, e.g., Kaplan, *Powell v. Texas: Alcoholics Anomalous, Chapter 1 or, Chronic Alcoholism and Criminal Responsibility*, 5 CRIM. L. BULL. 191, 192 (1969); Kirbans, *Chronic Alcohol Addiction and Criminal Responsibility*, 54 A.B.A.J. 877, 888 (1968); Merrill, *supra*

petitioner, for example a skid row alcoholic, the Court could not as easily have distinguished *Robinson*. The punishment of an obviously morally blameless actor, rather than a status, would have been implicated. The Court would perhaps have been compelled to overrule *Robinson*, or more likely,²²⁸ apply *Robinson* in order to exculpate the alcoholic.

IV. CRITICIZING RUMMEL

The Supreme Court expressly stated that Rummel's mandatory habitual offender sentence of life imprisonment pursuant to Texas law did not constitute cruel and unusual punishment.²²⁹ It rejected as speculative Rummel's characterization of his crimes as petty.²³⁰ Two of the three tests of proportionality used by the petitioner, the seriousness of the offense and the intrajurisdictional tests, were thus treated as too subjective for Court use.²³¹ The Court also discounted the third approach, interjurisdictional analysis, as not inherently flawed, but too complex in this case, involving only "subtle rather than gross"²³² distinctions. Rejecting any claim of gross disproportionality based solely on this latter approach, the Court noted that an interjurisdictional approach would violate traditional notions of federalism.²³³ Generally, the Court in *Rummel* requires that before a federal court will declare state criminal legislation to be in violation of the eighth amendment on proportionality grounds, sufficient objective criteria must exist by which evaluation of the claim can take place without impinging on the paramount concepts of federalism and separation of powers.

So described, the *Rummel* opinion seems relatively unsurprising. In the context of prior proportionality case law and other distributive justice criminal law litigation, however, *Rummel* continues the unfortunate trend in personhood litigation. Within this broader context, *Rummel* is a disappointing and potentially far-reaching decision. This section argues that the

note 226, at 1163-64; Note, *Constitutional Law—Cruel and Unusual Punishment—Conviction of a Chronic Alcoholic for Public Intoxication Not Violative of Eighth Amendment Proscription of Cruel and Unusual Punishment*, 18 BUFFALO L. REV. 337, 353, 355 (1968).

228. *Powell* was a five-to-four opinion. Justice White, one of the five Justices who voted to affirm the conviction, concurred. He wrote:

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson v. California*, . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. . . . Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu . . . but permitting punishment for running a fever Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking

Powell v. Texas, 392 U.S. 514, 548-49 (1968) (White, J., concurring) (citations omitted). Justice White might have been compelled to change his vote had Powell been a skid row alcoholic. *Robinson* would have thereby been extended somewhat and not limited to its facts.

229. *Rummel v. Estelle*, 445 U.S. 263, 285 (1980).

230. *Id.* at 275.

231. *Id.* at 282-83 n.27.

232. *Id.* at 279.

233. *Id.* at 281-82.

opinion: (1) is poorly crafted; (2) demonstrates too little sensitivity to the proportionality doctrine and too much deference to legislative wishes; (3) is jurisprudentially confused; and (4) was affected by inappropriate legal strategy.

A. *Craftsmanship*

Rummel is so important to the future of entire classes of persons and to societal institutions that "the reasons . . . [the Court gives for its] decision are more important to the development of the law than the decision itself."²³⁴ The Court properly serves its legal and political function to interpret and apply constitutional doctrine when it writes opinions that demonstrate the judicial process at its finest. Specifically, the Court's analysis and exposition should serve as a useful guide to the profession, to the other institutions of government, and to the public;²³⁵ it should explain and justify the source of its reasoning; and it should write coherent, candid opinions that generally adhere to precedent, except when injustice would otherwise occur.²³⁶ Unfortunately, the majority opinion of Justice Rehnquist in *Rummel v. Estelle* fails on all of these counts.²³⁷

1. *Misinterpretation of Precedent.* Writing for the majority in *Rummel*, Justice Rehnquist gave his "without fear of contradiction" statement, and stated that the length of sentences imposed for classified or classifiable felonies is purely a matter of legislative prerogative.²³⁸ He implied, thereby, that *Rummel* was asking the Court to expand, rather than merely to apply, the law of the eighth amendment. If this were true, *Rummel* would be a less exceptional case. In fact, however, Justice Rehnquist is less than candid in his interpretation of prior case law. *Rummel* is to *Weems*'s proportionality what *Patterson* was to *Mullaney*, *Powell* was to *Robinson*, and subsequent cases were to *Lambert* and *Morissette*.²³⁹ Just as in those areas, in the area of proportionality the Supreme Court began hesitantly, developed a proportionality doctrine, and then backed off in *Rummel* under the claim of legislative prerogative. In *Rummel*, however, the Court did more than simply recede from the logical implications of a prior opinion or candidly narrow the holding of a past case. It put a false appearance on precedent.

The holding of *Weems* is murky. Justice Rehnquist's opinion in *Rum-*

234. *Craig v. Harney*, 331 U.S. 367, 394 (1947) (Jackson, J., dissenting). This conclusion is not to demean in the slightest the severe impact of *Rummel* on the life of the petitioner.

235. C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 13 (1969).

236. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (1921); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 329, 334, 349 (1976).

237. This criticism of Justice Rehnquist's opinion in *Rummel* is consistent with Professor Shapiro's criticisms of early Rehnquist craftsmanship. See generally Shapiro, note 236 *supra*.

238. 445 U.S. at 274; see text accompanying note 54 *supra*.

239. See text accompanying notes 172-228 *supra* and note 187 *supra* and accompanying text.

mel did not narrow the express holding of that decision. It did, however, ignore the implied holding of the case, so that *Rummel* conflicts with the common previous understanding of the *Weems* doctrine.²⁴⁰ At the least, Justice Rehnquist's "without fear of contradiction" comment could have been more accurately written to read that "one could argue without fear of contradiction by any decision of this Court that the eighth amendment requires as a precept of justice that punishment be proportioned to the severity of the offense, and that this precept has never been limited to non-length-of-incarceration cases."

Justice Rehnquist limited *Weems* to its facts.²⁴¹ He appears to have claimed that the "bright line" of the "accessories" was a prerequisite to the constitutional holding. The *Weems* Court was understandably shocked by the accessories. That fact does not mean, however, that the *Weems* proportionality rule was not otherwise applicable. The *Weems* opinion often noted both the length of Weems's imprisonment and the accessories, usually in conjunction, for while each aspect of the punishment was remarkable on its own, the totality of the mandatory sentence seemed particularly Draconian. *Weems* was a revolutionary opinion since for the first time the Supreme Court expanded the eighth amendment beyond common law death penalty tortures. In addition, *Weems* was the first case to state the existence of a proportionality principle.²⁴² In light of the existence of the accessories as well as the "impressive"²⁴³ length of imprisonment, to decide whether either factor standing alone was excessive would have been unnecessary and probably inadvisable. The Court would have been guilty of poor craftsmanship if it had done so.²⁴⁴

Furthermore, much of the *Weems* opinion reasonably suggested that the *Weems* Court did not focus as much on the accessory issue as Justice Rehnquist claimed and that it would have declared the penalty disproportionate even without the accessories. First, the Court in *Weems* stated "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."²⁴⁵ Nowhere in the opinion did the Court limit this broad precept of justice. In light of the revolutionary nature of its decision, one can reasonably expect that if the decision were intended to be narrow—that the precept of justice was a limited one, or that it would be limited in application—the Court would have either explicitly stated the limitation or at least suggested it.

Secondly, the error assigned by Weems himself was that "punishment of fifteen years' imprisonment was a cruel and unusual punishment."²⁴⁶ In

240. Although lower courts were originally hesitant to apply *Weems*, see note 171 *supra*, modern courts did apply the rule to length of incarceration cases, see note 61 *supra*. Published commentaries also generally described *Weems* without expressly limiting it to its mode of punishment. *E.g.*, Wheeler, *supra* note 112, at 841.

241. See notes 44-46 *supra* and accompanying text.

242. See notes 156-57, 167-70 *supra* and accompanying text.

243. *Rummel v. Estelle*, 445 U.S. at 274.

244. Shapiro, *supra* note 236, at 328.

245. 217 U.S. 349, 367 (1910).

246. *Id.* at 359.

the petitioner's argument the accessory issue apparently was never raised;²⁴⁷ discussion centered entirely on the length of imprisonment. Moreover, the Court twice quoted verbatim the petitioner's assignment of error.²⁴⁸ If the Court meant to limit judicial intervention to cases involving the unusual mode of accessory punishment, then one would not expect the Court to have stated the issue in terms of the length of imprisonment.

Thirdly, the *Weems* Court cited *McDonald v. Commonwealth*,²⁴⁹ a Massachusetts case, which found a prison sentence grossly disproportionate. *McDonald* involved solely the length of imprisonment. The fact that the *Weems* Court cited *McDonald* at a point in the opinion at which it was attempting to buttress its eventual claim that the eighth amendment prohibits disproportionate punishment is circumstantial evidence of the breadth of the *Weems* rule.

Fourthly, the Court cited its own Civil War decision of *Pervear v. Commonwealth*,²⁵⁰ in which the Court in a dictum observed that a three-month prison sentence and a fifty-dollar fine was not excessive in view of the crime committed.²⁵¹ The *Weems* Court commented that *Pervear* was "[a] decision from which no one will dissent."²⁵² What was the "decision"? The decision was not a rejection of the excessiveness claim because it was a mere length of imprisonment case. The decision, if a dictum can be so characterized, was that the sentence was not excessive. If *Weems*, however, is as narrow an opinion as Justice Rehnquist suggests, the *Weems* Court should have viewed the *Pervear* discussion of the excessiveness of the sentence, even though a dictum, as inappropriate.

Fifthly, much of the language in *Weems* demonstrated deep concern for the relationship between the crime and the number of years of imprisonment. The following language from *Weems* immediately preceded the "accessory language" that Justice Rehnquist quoted in *Rummel*:²⁵³

The law therefore allows a range from twelve years and a day to twenty years. . . . The minimum term . . . is twelve years, and that, therefore, must be imposed for "perverting the truth" in a single item of a public record, though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it. Twenty years is the maximum imprisonment, and that only can be imposed for the perversion of truth in every item of an officer's accounts Between these two possible sentences, which seem to have no adaptable relation, or rather in the difference of eight years . . . the courts below selected three years to add to the minimum of twelve years and a day for the falsification of two items of expenditure amounting to the sums

247. *Id.* at 351-59.

248. *Id.* at 359, 362.

249. 173 Mass. 322, 53 N.E. 874 (1899).

250. 72 U.S. (5 Wall.) 475 (1867).

251. *Id.* at 480. The crime charged was the keeping and maintaining, without a license, of a tenement for the illegal sale and illegal keeping of intoxicating liquors.

252. 217 U.S. 349, 369 (1910).

253. See note 46 *supra* and accompanying text.

of 408 and 204 pesos.²⁵⁴

The Court was balancing the harm caused (no injury and, at most, falsification of 612 pesos) and the blameworthiness of the actor (no fraud, no gain or desire for it) versus the penalty of fifteen years. The excerpt also demonstrates the *Weems* Court's concern that there was no legislative effort to graduate penalties between the twelve- and twenty-year extremes for single and total falsification. This type of careful analysis is some evidence that the Court was seriously concerned with the length of imprisonment. Even Justice Rehnquist described the offense for which *Weems* was convicted as "trivial,"²⁵⁵ a characterization he was unwilling to make in *Rummel*'s case, and the length of *Weems*'s imprisonment as "impressive."²⁵⁶ If the offense was "trivial" and the sentence "impressive," it seems reasonable to assert that if there is a precept of justice that punishment be graduated to the severity of crime, the *Weems* Court that first enunciated this precept would have enforced it in that case on the basis of length of imprisonment alone. The language quoted above from *Weems* is most probably such an application. Finally, the dissent in *Weems* viewed the holding in the broader sense when it said, "I yet cannot agree with the conclusion reached in this case that because of the mere term of imprisonment it is within the rule."²⁵⁷

Weems, then, seems to be a broader holding than Justice Rehnquist acknowledged. This conclusion is further buttressed by the fact that post-*Weems* cases fail to support Justice Rehnquist's interpretation of *Weems*. Justice Rehnquist cited *Badders v. United States*,²⁵⁸ a decision rendered a few years after *Weems*. *Badders* was convicted of seven counts of mail fraud, each of which involved one letter, was sentenced to a total of five years in prison, and was fined \$1,000 per count. The Court in *Badders* held that there was no violation of the eighth amendment.²⁵⁹ It gave no reason for its conclusion except to cite two previous cases,²⁶⁰ neither of which appears to have been an eighth amendment, much less a proportionality, case. From this shaky record Justice Rehnquist nonetheless concluded that *Weems* was narrowly decided. Three more plausible explanations for *Badders* exist, however. First, as *Rummel* himself pointed out, the *Badders* record gave no evidence that a claim of proportionality was ever raised.²⁶¹ Secondly, the issue before the *Badders* Court was that of trying and sentencing a person on separate counts for what may have been a single offense. Judicial, not legislative, action was involved. That this issue received the Court's focus is supported by the *Bad-*

254. 217 U.S. 349, 365-66 (1910).

255. *Rummel v. Estelle*, 445 U.S. at 274.

256. *Id.*

257. 217 U.S. 349, 411 (1910) (White, J., dissenting).

258. 240 U.S. 391 (1916).

259. *Id.* at 394.

260. *Ebeling v. Morgan*, 237 U.S. 625 (1915); *Howard v. Fleming*, 191 U.S. 126 (1903).

261. Petitioner's Brief, *supra* note 15, at 22 n.9; Reply Brief for the Petitioner in the Supreme Court of the United States at 2 n.1, *Rummel v. Estelle*, 445 U.S. 263 (1980).

ders Court's citation to *Ebeling v. Morgan*,²⁶² which expressly raised such a nonproportionality question. Finally, even if the Court had reached the *Weems* issue, it no doubt would have concluded that five years' imprisonment and a fine of \$7,000 was not disproportionate punishment in a case involving mail fraud of seven letters. So interpreted, there is absolutely no reason why the *Badders* Court should have cited *Weems*, since *Weems* would not have supported its conclusion. The absence of such a citation, therefore, does not support Justice Rehnquist's conclusion.

The Court also used precedent improperly when it cited *Graham v. West Virginia*²⁶³ to support its holding. First, the facts in *Graham* are not indistinguishable from those in *Rummel*, as the *Rummel* opinion claims.²⁶⁴ *Graham* committed two thefts and a burglary, not three thefts. Burglary is a more serious offense than theft.²⁶⁵ Also, *Graham* stole horses worth \$310, rather than the \$229 in money stolen by *Rummel*. In light of inflation, *Graham* stole the equivalent of \$1,287 in 1970 dollars or nearly six times as much money as did *Rummel*.²⁶⁶ Secondly, *Graham* was decided before the eighth amendment was expressly made applicable to the states.²⁶⁷ Thirdly, *Graham* is a classically poorly crafted opinion, weak in precedential value. *Graham* gives no reason, except to cite six pre-*Weems* cases,²⁶⁸ for its one sentence holding that cruel and unusual punishment had not been inflicted. Four of the cases cited were nonrecidivist cases.²⁶⁹ Three of the four expressly point to the fact that the eighth amendment was inapplicable to the states.²⁷⁰ One of the cases simply said in a dictum that a sentence of ten years' imprisonment for felony conspiracy was not an excessive sentence.²⁷¹ Of the two cases cited that involved habitual of-

262. 237 U.S. 625 (1915).

263. 224 U.S. 616 (1912).

264. See note 57 *supra* and accompanying text.

265. Burglary at common law involved a breach against a person's habitation and not a mere property loss. R. PERKINS, *supra* note 124, at 192. The public perceives burglary resulting in theft as a more serious offense than the theft itself. Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974) [hereinafter cited as Rossi]. In the Rossi study a burglary of a television set at a home was the 68th most serious crime it tested, while a burglary of a store in which more than one set was stolen was only 80th. Theft of an automobile was 78th, and other thefts were ranked 111th, 115th, 117th, and 129th. *Id.* at 228-29.

266. U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES; COLONIAL TIMES TO 1970 (PART I), H.R. DOC. NO. 93-78, 93d Cong., 1st Sess., Series E 135-166, at 211 (1975) (using years 1907 and 1970 as the years for comparison).

267. *Robinson v. California*, 370 U.S. 660 (1962), was the first case to declare a state statute unconstitutional under the eighth amendment.

268. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *Coffey v. County of Harlan*, 204 U.S. 659 (1907); *Howard v. Fleming*, 191 U.S. 126 (1903); *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *Moore v. Missouri*, 159 U.S. 673 (1895); *In re Kemmler*, 136 U.S. 436 (1890).

269. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *Coffey v. County of Harlan*, 204 U.S. 659 (1907); *Howard v. Fleming*, 191 U.S. 126 (1903); *In re Kemmler*, 136 U.S. 436 (1890).

270. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *Coffey v. County of Harlan*, 204 U.S. 659 (1907); *Howard v. Fleming*, 191 U.S. 126 (1903).

271. *Howard v. Fleming*, 191 U.S. 126, 136 (1903).

fender statutes,²⁷² one of them²⁷³ stated no reason whatsoever for its conclusion that there was no violation of the cruel and unusual punishment clause. The remaining case, *Moore v. Missouri*,²⁷⁴ is a particularly murky opinion of limited persuasiveness.²⁷⁵ Moreover, it involved an habitual offender law very different from that involved in *Graham* or *Rummel*. The *Moore* statute required the sentencing authority to punish recidivists the maximum punishment possible for a first time offender. In other words, the law upheld in *Moore* did not require enhancement of punishment, but only mandated nonleniency in punishment. *Graham*, then, without explanation, cited inappropriate cases. The Court in *Rummel* should not have viewed *Graham* as a serious statement about any principle.

Furthermore, other Justices seemed to have understood *Weems* in the broad sense. In *Corey v. United States*,²⁷⁶ for example, Justice Stewart in a footnote stated that the maximum possible sentence in that case, 375 years in prison, "would obviously raise a serious issue under the Eighth Amendment of the Constitution."²⁷⁷ This statement was in an opinion to which eight Justices signed their names. Justice Frankfurter, a Justice not known to favor judicial activism, may have also understood the eighth amendment to be applicable in length-of-incarceration cases. In *Lambert v. California*²⁷⁸ Justice Frankfurter hinted that the eighth amendment could constitute a possible objection to a person in Lambert's dilemma.²⁷⁹

Finally, as the *Rummel* Court observed, many death penalty decisions have repeated the *Weems* doctrine.²⁸⁰ None, however, ever indicated that the proportionality rule was limited to unusual mode-of-punishment cases. Although the Court has stated the obvious—that the death penalty is unique—no decision previously claimed that such uniqueness was a prerequisite to the judicial application of *Weems*'s precept of justice.

272. *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *Moore v. Missouri*, 159 U.S. 673 (1895).

273. *McDonald v. Massachusetts*, 180 U.S. 311 (1901).

274. 159 U.S. 673 (1895).

275. First, *Moore* expressly stated that the fourteenth amendment "was not designed to interfere with the power of the State to protect the lives, liberty, or property of its citizens." *Id.* at 678. Secondly, it cited lower court state cases to explain why recidivist laws did not violate the double jeopardy clause. *Id.* at 677. It then stated that, "It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that [the petitioner] was not twice put in jeopardy for the same offence, or that the increase of his punishment . . . was not cruel and unusual." *Id.* Even assuming that the reasoning of the state courts was intended as an eighth amendment justification, it is of limited value. One of the cases cited expressly stated that, "punishment . . . out of all just proportion to the comparatively trivial nature of the offense. . . . is a subject for the consideration of the Legislature and not of the courts." *People v. Stanley*, 47 Cal. 113, 117 (1874). Even under the narrow interpretation of *Weems* this statement is incorrect.

276. 375 U.S. 169 (1963).

277. *Id.* at 171 n.3.

278. 355 U.S. 225 (1957).

279. "[A] cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment" *Id.* at 231 (Frankfurter, J., dissenting).

280. See note 161 *supra*.

The Court also misinterpreted the precedent of *Coker v. Georgia*²⁸¹ as it pertained to the requirement of objectivity in proportionality cases. The Court in *Coker* sought guidance from the available objective evidence. It stated that its "judgment should be *informed* by objective factors to the *maximum possible* extent."²⁸² The Court did not conclude, however, that it should avoid judgment if objectivity was not entirely possible. In fact, it stated that such factors cannot "wholly determine this controversy, for the Constitution contemplates . . . our own judgment will be brought to bear on" the eighth amendment issue.²⁸³ *Coker*, then, in fact, called for exactly the conclusion that Rummel offered in his brief:²⁸⁴ the limitation, not the replacement, of subjectivity.

Precedent does not support the *Rummel* majority opinion. *Weems* declared a broad precept of justice that the judiciary was expected to enforce and that various lower courts did enforce until the decision in *Rummel* was handed down.²⁸⁵ *Rummel* must be viewed as a step backward because it erroneously or uncandidly interpreted precedent.

2. *Distortion, Overkill, and Underkill.* By distorting the facts and focusing on irrelevancies, the Court also misstated the issue in *Rummel*. For example,²⁸⁶ the majority opinion first noted Rummel's concession that his crimes might properly be treated as felonies, and from that concession the Court distorted the issue at hand. A "felony" in Texas, as the Court admitted, is an offense that "may—not must—be punishable by . . . confinement in the penitentiary."²⁸⁷ That definition, however, makes absolutely no reference to the length of such incarceration. The opinion nonetheless proceeded later to define "felony" as a crime punishable by a "significant [term] of imprisonment in a state penitentiary."²⁸⁸ This definition serves the purpose of changing Rummel's concession from an admission that

281. 433 U.S. 584, 593 (1977).

282. *Id.* at 592 (emphasis added).

283. *Id.* at 597.

284. Petitioner's Brief, *supra* note 15, at 63.

285. *See* note 168 *supra*.

286. Two less important examples of distortion exist. The first is Justice Rehnquist's treatment of murder by poison as nonviolent. *See* note 68 *supra* and accompanying text. Although the term "violence" applies to either a result or its means, it is often defined in the former sense. *E.g.*, *Boecker v. Aetna Cas. & Sur. Co.*, 281 S.W.2d 561, 564 (Mo. App. 1955) ("with reference to its effect on another"); *Commonwealth v. Nadolny*, 163 Pa. Super. 517, 63 A.2d 129, 130 (1949) ("to inflict harm or injury upon"). Death by poison is usually viewed as a violent death. *Watkins v. National Elec. Prods. Corp.*, 165 F.2d 980, 982 (3d Cir. 1948); *Gahn v. Leary*, 318 Mass. 425, 61 N.E.2d 844, 846 (1945). At the least, Justice Rehnquist is guilty of ignoring the common understanding that murder is a violent crime.

Secondly, Justice Rehnquist treats drug crimes as property crimes in order to make them indistinguishable from Rummel's crimes. *Rummel v. Estelle*, 445 U.S. at 282 n.27. Drug crimes, however, are not generally treated in the same category as property crimes. *See* Rossi, *supra* note 265, at 231; FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (any year).

287. *Rummel v. Estelle*, 445 U.S. at 268 n.8 (quoting Tex. Penal Code Ann. art. 47 (Vernon 1925)).

288. 445 U.S. at 274.

Texas could have imprisoned him for each of the crimes to an admission that he could be imprisoned for a substantial length of time. With this manipulation, the Court made the issue at bar less dramatic: "the State's authority to impose a sentence of life imprisonment, as opposed to a substantial term of years, for [Rummel's] third felony."²⁸⁹ A bright line is less likely when the issue is so misframed.

Justice Rehnquist's opinion also irrelevantly indicated that "Rummel concededly could have received sentences totaling [twenty-five] years in prison for what he refers to as his 'petty property offenses.'"²⁹⁰ The issue in *Rummel*, of course, was not the propriety of amassing the sentences for these three crimes; the issue was the validity of the punishment of life for the third crime itself. This statement by Justice Rehnquist, however, despite its irrelevancy, served a purpose. It demeaned Rummel's claim that his crimes were petty by implying that the amassing of three arguably petty offenses thereby makes them individually nonpetty. It also further distorted the focus of the case. By misstating the issue as "life . . . [versus] a substantial term of years"²⁹¹ immediately after having totalled Rummel's felony sentences to twenty-five years, Justice Rehnquist gave the false impression that the issue at stake was particularly minor: twenty-five years versus life.²⁹²

The Court also discussed an issue not before it. In light of Rummel's concession regarding the feloniousness of his crimes the Court needed only to decide the validity of punishing recidivist Rummel as Texas did. Nonetheless, Justice Rehnquist expressly and gratuitously stated that "Texas is entitled to make its own judgment as to where [the line between felony and misdemeanor larceny lies], subject only to those strictures of the Eighth Amendment that can be informed by objective factors."²⁹³

On the other hand, the Court failed explicitly to reach an issue raised by the case, briefed by the parties,²⁹⁴ and logically necessary to the result: the application of the alternative prong of *Coker's* excessiveness test, which prohibits punishment that "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless

289. *Id.* at 270-71.

290. *Id.* at 269.

291. *Id.* at 271.

292. Even with the issue so framed, the issue was substantial. At one point the Court treated as few as three, or perhaps two, years maximum imprisonment as significant terms. *See id.* at 270 n.10, in which the Court listed "significant terms," including a sentence of either a "fine or up to 3 years" imprisonment for North Dakota credit card theft. In *id.* at 269 n.9, the Court listed a punishment of "up to 2 years" in Louisiana for false pretenses. In framing the issues, the Court used the word "substantial," not "significant," but both words are synonymous for the adjectives "important" or "considerable." ROGET'S INTERNATIONAL THESAURUS § 672.16 (4th ed. 1977). Assuming the Court used the two words in this fashion, the issue, then, in *Rummel* was a choice between "2 years or life;" hardly a close case.

293. 445 U.S. at 284.

294. *See* Petitioner's Brief, *supra* note 15, at 47-60; Brief for the Respondent in the Supreme Court of the United States at 26-30, *Rummel v. Estelle*, 445 U.S. 263 (1980) [hereinafter cited as Respondent's Brief].

and needless imposition of pain and suffering.”²⁹⁵ The opinion instead treated directly only the proportionality claim.²⁹⁶

3. *Unclear and Inconsistent Reasoning.* Court opinions are rarely as clear as analysts would wish. *Rummel*, however, as the following two examples illustrate, is needlessly inconsistent and ambiguous. First, the opinion spoke inconsistently and ambiguously regarding the role of the judiciary in *Rummel*-type cases. On the one hand was the “without fear of contradiction” statement, suggesting that length of imprisonment in felony cases is solely a matter of legislative discretion.²⁹⁷ Although the majority opinion did not say that such a proposition is correct, only that it is uncontradictable by *stare decisis*, nothing in the opinion suggested that the Court intended to diverge from this interpretation of precedent. Yet, the Court expressly left open the question of the validity of imprisonment for life for the crime of obtaining \$120.75 by false pretenses.²⁹⁸ Elsewhere, it quoted approvingly Justice Frankfurter’s view that “severity of punishment . . . [is] peculiarly [a question] of legislative policy,”²⁹⁹ and observed that “any ‘nationwide trend’ toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures.”³⁰⁰ On the other hand, the Court hedged in its statement that the state may act “subject only to those strictures of the Eighth Amendment that can be informed by objective factors.”³⁰¹ Although “there remains little in the way of objective standards,”³⁰² the Court did not expressly say that none exist. Rather, the line in death penalty and *Weems*-type cases is only “considerably clearer”³⁰³ than in cases like *Rummel*. Recidivist cases are only “largely within the discretion”³⁰⁴ of the states. The ambiguity or inconsistency may constitute a carefully intended decision by the Court to leave open the possibility of a different result in some case not yet imagined by the Court,

295. 433 U.S. 584, 592 (1977); see note 377 *infra*. *Coker* separated the “excessiveness” concept into two alternative considerations, that is, of gross disproportionality and the question of needless punishment. *Coker* did not reach the latter prong. 433 U.S. at 592 n.4. In a dictum, however, it said “it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States’ criminal justice system.” *Id.* This prong has never been the basis of a Supreme Court holding, although it was also briefly discussed by Justice White in *Lockett v. Ohio*, 438 U.S. 621 (1978), wherein he argued that the death penalty for nonintentional killers violated the prong, largely because the punishment lacked deterrent value. *Id.* at 625-26.

296. The Court’s frequent utilitarian justifications for recidivist laws implicitly addressed this issue. Nonetheless, as this prong of *Coker* has never been the subject of analysis in a post-*Coker* majority opinion, the Court should have fulfilled its responsibility, see notes 234-37 *supra* and accompanying text, to expressly reach and explain its first-prong result.

297. 445 U.S. at 274; see text accompanying note 54 *supra*.

298. 445 U.S. at 276.

299. *Id.* at 282-83 n.27 (emphasis added).

300. *Id.* at 284.

301. *Id.*

302. *Id.* at 282-83 n.27 (emphasis added).

303. *Id.* at 275.

304. *Id.* at 285.

or it may be the result of a compromise needed to obtain a fifth vote. In either case the result is internal inconsistency and undesirable ambiguity.

Secondly, footnote 11³⁰⁵ of the majority opinion is an enigma. It stated that proportionality "does come into play" in the "extreme example" of a legislature making overtime parking a felony punishable by life imprisonment. The Court failed to explain, however, why such a case requires judicial involvement in what is elsewhere viewed as largely or solely a legislative matter. Does the Court mean that the proportionality "comes into play" in order to invalidate the punishment, or only that a justiciable issue exists? No answers are given. No rationale for the exception is stated.

B. *Deference to the Legislature*

1. *Improper Court Deference.* *Rummel* represents a dramatic change in attitude regarding the significance of the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."³⁰⁶ *Rummel* stands for the proposition that in a *Rummel*-type case³⁰⁷ either no proportionality requirement exists, or although one exists, the Supreme Court will not intervene to enforce it. Because of the poor craftsmanship of the opinion, one cannot determine with certainty which interpretation the Court intended. Although the judicial result is virtually the same either way in that *Rummel* loses, the societal implications are dramatically different. If *Rummel* means that proportionality is not a requirement in *Rummel*'s case, then legislatures and sentencing authorities are not compelled by the Constitution to try to fashion a proportionate punishment. If the Court intended only to defer to the Texas Legislature, then legislatures must continue conscientiously to attempt to implement the still applicable precept of justice.

Some of the opinion implies there is no proportionality doctrine in a case such as *Rummel*. The Court's assurance that proportionality is required in death penalty and *Weems*-type cases³⁰⁸ and that it "come[s] into play" if a legislature sentences overtime parkers to life imprisonment³⁰⁹ suggests that no proportionality rule comes into play in *Rummel*'s case. Moreover, the Court did not say that *Rummel* failed to prove by use of objective criteria that his sentence violated the eighth amendment; it said simply that the life sentence did not violate the eighth amendment.³¹⁰ If the implication of *Rummel* is that proportionality is not required in such cases, then the proportionality principle would have met the same fate as in the mens rea situation:³¹¹ it would be an important, but not constitu-

305. *Id.* at 274 n.11.

306. *Weems v. United States*, 217 U.S. 349, 367 (1910).

307. We leave full analysis of what is a "*Rummel*-type case" for later discussion. See notes 407-49 *infra* and accompanying text.

308. 445 U.S. at 272.

309. *Id.* at 274 n.11.

310. *Id.* at 285.

311. See notes 177-88 *supra* and accompanying text.

tional concept, except sometimes.

Such an interpretation, although plausible, is very unlikely, for precepts of justice are not normally limited to cases in which objective factors exist to prove their violation. That the existence of objective criteria should be required to trigger a precept of justice defies reason. Instead, the Court probably meant only to suggest its unwillingness to intervene in *Rummel*-type cases to enforce the still present proportionality principle. Such an interpretation is consistent with its expressed concern for federalism and objectivity and its "reluctance to review legislatively mandated terms of imprisonment."³¹² By his use of the "come into play" language, Justice Rehnquist probably meant not "come into existence" but "be enforced." So viewed, *Rummel* represents the common fate of other distributive justice concepts of the principle of proportionality: belated deference to the legislature.

The deference in proportionality cases, however, is more substantial and more detrimental to the principle of personhood than in other areas. Deference to the legislature in the mens rea area can be justified on the ground that the doctrine is not viewed as a constitutional principle.³¹³ The same is true with defenses.³¹⁴ In *Rummel*, however, the Court impliedly conceded the existence of a constitutionally based principle of proportionality, but deferred to the legislature with regard to its implementation. In *Patterson*,³¹⁵ in which the Court conceded a constitutional right was at stake,³¹⁶ that due process requires all prima facie elements to be proven beyond a reasonable doubt, the Court's deference was nonetheless accompanied by an expression of limitation upon legislative authority. In *Rummel* no limits were stated,³¹⁷ and no assurance was made that deliberate indifference to the precept of justice or gross negligence in its application would constitute a basis for judicial reintervention.

This Article is not the forum to debate generally the wisdom of Court abstention with regard to socially sensitive issues. Rather, the Court may be criticized for its inconsistency. A double standard has developed whereby the Supreme Court is far less prone to defer in matters of criminal procedure than substantive criminal law without offering sufficient justification for the differential treatment. *Rummel* represents the apex of such unequal judicial review.

Chief Justice Taft once indicted the criminal justice system as "a disgrace to our civilization."³¹⁸ Justice Frankfurter repeated the accusation

312. 445 U.S. at 274.

313. See note 174 *supra*.

314. See, e.g., *Powell v. Texas*, 392 U.S. 514, 534-36 (1968); *Fisher v. United States*, 328 U.S. 463, 476-77 (1946).

315. *Patterson v. New York*, 432 U.S. 197 (1977); see text accompanying notes 210-13 *supra*.

316. 432 U.S. at 206.

317. Perhaps the Court's statement in footnote 11 establishes a limit. 445 U.S. at 274 n.11. If so, this is a trivial limit, see notes 417-49 *infra* and accompanying text, and it would have behooved the Court to explain it.

318. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 11 (1905).

as recently as 1952.³¹⁹ Since then, however, the procedure of criminal justice has been revolutionarily changed, largely due to the initiative of the Supreme Court. In matters of procedure the Burger Court is not an "apostle of judicial restraint."³²⁰ Moreover, as Professor Ely has observed:

The current Court's constitutional jurisprudence is therefore not content with limiting its intervention to disputes with respect to which there exist special reasons for supposing elected officials cannot be trusted Instead, it importantly involves the Court in the merits of the policy or ethical judgment sought to be overturned, measuring those merits against some set of "fundamental" value judgments. *This is not by any means an orientation original to the Burger Court.*³²¹

As activist as the Supreme Court has been in areas of procedural reform, substantive criminal law has barely changed. Inadequacies in common law theory³²² have largely been left intact by legislatures, and legislatures have undermined other aspects of the principle of personhood generally protected at common law.³²³ Meanwhile the Supreme Court, as demonstrated earlier, has largely deferred to such legislative indifference. Various rationales exist for this double standard. First, the Constitution expressly speaks to matters of criminal procedure, but not substance.³²⁴ The judicial role in the former is thus more obviously legitimate. Secondly, commentators claim that judges have expertise in matters of procedure, but substantive criminal law implicates issues of policy, a traditionally legislative field in light of the countermajoritarian status of the judiciary.³²⁵ As an initial matter, the distinctions traditionally drawn between procedure and substance are weak. The line between the two parts of criminal law is largely symbolic. Much of "procedure" involves "substance." The "procedural" question of burden of proof necessarily implicates the substantive issue of what is a *prima facie* crime.³²⁶ The fourth amendment question of detention and questioning of citizens regarding crimes also impacts on the laws of attempt and the validity of certain substantive criminal statutes.³²⁷ No rigid line between the two areas is possible.

Even if one assumes that some meaningful line can be drawn between matters of substance and procedure, however, the justifications offered for

319. *Leland v. Oregon*, 343 U.S. 790, 802 (1952).

320. Choper, *The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights*, 30 SYRACUSE L. REV. 767, 787 (1979).

321. Ely, *The Supreme Court 1977 Term: Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 15 (1978) (emphasis added).

322. See, e.g., note 140 *supra*.

323. See, e.g., note 174 *supra*. Strict liability criminal offenses are of recent legislative vintage. See generally Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

324. E.g., U.S. CONST. amends. IV, V, VI, VIII.

325. Goldberg & Dershowitz, *supra* note 144, at 1800-01. Goldberg and Dershowitz use the term "countermajoritarian" to express the fact that the judiciary, as a nonelected institution, can frustrate public policies formed by the legislative body, which is thought to represent the wishes of the majority.

326. See note 215 *supra* and notes 456-66 *infra* and accompanying text.

327. See, e.g., *Brown v. Texas*, 443 U.S. 47 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968).

the application of different standards of judicial review are invalid. Nowhere does the Constitution speak of a fourth amendment exclusionary rule. It was judicially created to enforce expressed rights.³²⁸ Other rights have been found outside the four corners of the Bill of Rights.³²⁹ The fact that the eighth amendment does not expressly enumerate specific punishments does not necessarily mean that it cannot be interpreted to protect significant substantive rights of the criminally accused.

Furthermore, the line between procedure and substance is not one between judicial procedure and policy. The exclusionary rule, and fourth amendment case law generally, represent judgments by the Court regarding competing policies of crime control and due process.³³⁰ The privilege against self-incrimination clearly represents a policy judgment in favor of requiring the state to shoulder a greater load in its effort to prosecute a suspect. Thus policy is involved with both substance and procedure.

Indeed, it may be more accurate to suggest that the line between procedure and substance is not one that distinguishes procedure from policy, nor even that procedure and substance are both properly characterized solely as matters of policy balancing, but that often the difference is between policy and principle. Most of criminal procedure involves the balancing of competing valid policies of crime control and due process. No right answer exists. Decisions are a matter of judgment on a policy continuum. The Supreme Court has regularly conducted this policy balancing, despite its countermajoritarian status. Substance, however, involves principles that limit policy decisions of legislatures. The question of what acts should be punished is largely a policy decision involving competing questions of efficiency and morality. The substance of criminal law, however, is also riddled with principles of a primary nature that must be established before one asks and answers such questions of policy. Clearly, the issue of distributive justice is a matter of principle. The principle of personhood is not intended to be justifiable in the instrumentalist sense.³³¹ Rather, it answers the moral question of whether a society can punish the innocent or disproportionately punish the guilty. This principle of personhood serves

328. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

329. The right to privacy is one example. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

330. For a discussion of the policies, see H. PACKER, *supra* note 109, at 149-73.

331. "Instrumentalism" is used to mean that criminal law punishment, or any other rule, is invoked in order to further some future goal, not simply because it is intrinsically right or moral to do so. So understood, it is roughly synonymous in this context with utilitarianism, without incorporating the specific goals of utilitarianism.

The instrumentalist theory rejects the importance of criminal law as a separate discipline and locates the criminal sanction within a matrix of devices designed to further the all-encompassing goal of social protection. The instrumentalist maintains that there is no intrinsic difference between criminal punishment and civil commitment; they both function to further the same goal of confining dangerous persons. As a result, the critical inquiry is whether particular rules are compatible with this ultimate goal. . . . [T]he facts of the individual case are less important than projections about the impact of punishment on the accused and on other persons who might be deterred.

Fletcher, *supra* note 110, at 302.

as a limit on application of instrumentalist policies by the legislature.³³² The application of established principle involves no balancing. The crucial question is whether the legislature or the judiciary should have the final word regarding the meaning and content of such principles. Given that the legislature will have the initial role, should the judiciary retain oversight of legislative actions that arguably impinge on the principle of personhood?

The answer to this question depends on which body is more likely accurately to find and enforce such values and on the implications of any error in its resolution.³³³ Certainly the task of finding precepts of justice is not foreign to the Supreme Court. Despite objections by various Justices to conducting such an exercise,³³⁴ the Court, through some of its least activist Justices, has regularly done so.³³⁵ Furthermore, "justice" does not seem to be a subject always outside judicial competence. Instead, the late Professor Bickel has noted four factors that together result in the Court's "lack of capacity" to adjudicate matters of justice:

(a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally, . . . the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.³³⁶

No one can seriously argue that any but perhaps the last factor is involved in proportionality cases. Yet, "electoral irresponsibility" is a strength, not a weakness, of the judiciary, because the issue to be adjudicated in proportionality cases is not one of political representation³³⁷ but the moral, non-utilitarian question of distributive justice. The judiciary should be more, not less, able dispassionately to measure society's moral winds than a legislature buffeted by vocal, and often unrepresentative, minority groups.³³⁸

The risks from court abdication are great. An error by the judiciary in favor of a defendant and against legislative action adds to the right of individuals while denying legislative flexibility. This error seems preferable to the alternative: leaving the enforcement of the principle of personhood to the good faith and abilities of legislative bodies. The violation of individual rights that would result from a legislative error in the application of that precept of justice is more serious than any loss of legislative flexibility

332. See generally Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). See also Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

333. Maltz, *Judicial Competence and Fundamental Rights*, 78 MICH. L. REV. 284, 285 (1979).

334. See, e.g., *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

335. E.g., *Rochin v. California*, 342 U.S. 165, 169 (1952) (Frankfurter, J.).

336. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962).

337. *Baker v. Carr*, 369 U.S. 186, 209-10 (1962).

338. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 716-17 (1976); Wellington, *supra* note 332, at 266-67.

that would be sacrificed by allowing judicial oversight.³³⁹

The conflicting trends of procedural activism and substantive deference are not explainable in any consistent, principled fashion. One can only suspect the real, unprincipled reasons for the double standard: (1) a lack of sensitivity by the Court to the paramount importance of the principle of personhood; (2) a fear of substantive criminal law because it raises difficult philosophical questions; (3) a lack of interest by the Court in the less exciting issues of "general justifying aims" and "distributive justice" as compared to the more appealing questions of warrantless searches and seizures; and (4) the fact that legal education trains its future judges in instrumentalist thinking, and does not "contaminate" them with moral philosophy.³⁴⁰

Certainly none of these reasons justifies deference. The issues of substantive criminal law are too important to merit such an attitude. Although the Court may wish to avoid slippery slopes, even the dissent in the original circuit court opinion in *Rummel* cautioned against judicial abdication.³⁴¹ Yet abdicate is exactly what the *Rummel* Court did. To suggest that the eighth amendment of the Bill of Rights incorporates a precept of justice that the states may not violate, but leaves its application in *Rummel*-type cases to the states themselves is ludicrous.³⁴² The eighth amendment calls for decency by the state in its treatment of its citizens. The inclusion of this basic moral principle within the Constitution creates a judicial responsibility to oversee its enforcement. Although this responsibility involves the "fusion of constitutional law and moral theory,"³⁴³ passivity is no more justifiable here than in the other interdisciplinary areas in which the legal community belatedly has become involved.³⁴⁴

The attorney general of Texas called on the Court to display judicial restraint because the case for judicial involvement was "so attractive."³⁴⁵ He claimed that Texas was entitled to treat *Rummel* differently than were

339. This view is not one possessed by Justice Rehnquist. In *Furman v. Georgia*, 408 U.S. 238, 468 (1972) (Rehnquist, J., dissenting), he speaks about the implications of judicial versus legislative error:

[A]n error in mistakenly sustaining the constitutionality of [a death penalty statute], while wrongfully depriving the individual of a right secured to him by the Constitution [herein, life], nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim . . . is a good deal more serious. . . . [It imposes] upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

340. Wellington, *supra* note 332, at 225-27; see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977).

341. *Rummel v. Estelle*, 568 F.2d 1193, 1202 (5th Cir. 1978) (Thornberry, J., dissenting), *aff'd*, 445 U.S. 263 (1980).

342. L. TRIBE, *supra* note 96, § 8.7, at 452.

343. R. DWORKIN, *supra* note 340, at 149.

344. Ely, *supra* note 321, at 36-37, whimsically denigrates the idea of courts' following the philosophers of the *New York Review of Books*. The advantage of the fusion of constitutional law and moral theory, however, is that the Court will thereby have a coherent philosophy, one capable of being understood and criticized on principled grounds.

345. Oral Argument, *supra* note 1, at 30.

other states "in light of unique Texas experience."³⁴⁶ The attorney general never stated what that experience was, and he conceded that Texas did not know what to do with recidivists such as Rummel.³⁴⁷ That a state would nonetheless ask for freedom to act outside the purview of judicial oversight is disquieting at the least.³⁴⁸ Even more disturbing is the Court's consent to the request. *Rummel* is subject to legitimate criticism, not simply because the Court allowed Texas to punish Rummel as it did, but because it suggested that Texas may do so largely without judicial supervision.

2. *Subjective Versus Objective Oversight.* Court supervision of the constitutional right of proportionate punishment is not a call for subjective evaluation. Nonetheless, without endorsing subjectivity, the Court's concerns should be put in proper perspective. The line between subjectivity and objectivity is not, and never has been, as bright as Justice Rehnquist would like it to be or suggests it has been.

First, although objectivity is no doubt a preferable approach to judicial analysis because of the seeming illegitimacy of a countermajoritarian institution applying its own values, subjectivity will not necessarily result in different conclusions than objectivity. "Judges . . . are warmed and cooled by the same winter and summer and by the same ideas as a layman is."³⁴⁹ Contending that judicial evaluation of a crime's seriousness is likely to be similar to general societal evaluations of most crimes as measured by legislative bodies is not implausible.³⁵⁰

Secondly, although subjectivity is not a popular value to endorse, and although the Supreme Court has always denied it has acted other than neutrally, the finding and enforcing of fundamental rights inevitably in-

346. *Id.* at 21.

347. *Id.* at 26.

348. There is a hint of laziness in Justice Rehnquist's opinion. It speaks at various times of the "complexities" confronting the Court in the case. See notes 78-82 *supra* and accompanying text. It almost appears as if the Court believes deference is appropriate merely because Rummel asked the Court to work hard. This may be why Justice Powell, in dissent, accused the majority of choosing "the easiest line rather than the best." 445 U.S. at 307. The difference between the requirement of "bright lines" and avoidance of difficult adjudication is not always easy to ascertain.

349. J. POWELL, *THE LOGIC AND RHETORIC OF CONSTITUTIONAL LAW* (1918), *quoted in* C. MILLER, *supra* note 235, at 32.

350. This question is essentially unstudied, but vital. One study might suggest a contradictory conclusion. In Erickson & Gibbs, *On The Perceived Severity of Legal Penalties*, 70 J. CRIM. L.C. & P.S. 102 (1979), the authors found that police officers perceive the severity of punishment differently than do private citizens. Generally, the former perceive prison sentences more severely than jail terms, probation, or fines. This distinction raises fascinating questions regarding proportionality analysis. Theoretically, a police officer would be more likely to find a given prison sentence disproportional to a given crime than would a civilian, because the former views the sentence as more severe. The authors do not offer a particular reason for the differential attitude, but a logical inference is that the judiciary might perceive severity of prison sentences differently than the general citizenry. This conclusion does not suggest, however, that evaluation of the moral seriousness of a crime, the other side of the formula, would differ. The author of this Article is currently conducting a law student evaluation of the seriousness of specific crimes, to be published in the near future, that may shed light on this question.

cludes a subjective component.³⁵¹ Protecting fundamental rights allows no alternative. Justice Felix Frankfurter spoke of the approach to finding "ultimate decency in a civilized society"³⁵² as a scientific one,³⁵³ but realism tells us it is not.³⁵⁴ As noted earlier,³⁵⁵ *Coker* was not the clarion of objectivity that Justice Rehnquist claimed it to be. Even if subjectivity is considered less undesirable in death penalty cases, the difference is one of degree, not kind.

Finally, application of the usual objective criteria of public sentiment, such as legislative enactments, jury deliberations, and public opinion polls,³⁵⁶ although nicely quantifiable, runs the risk of legitimizing less rational and more prejudiced judgments than application of less quantifiable and therefore so-called subjective values. Social science literature demonstrates that the public at times evaluates the seriousness of crime in inexplicable fashion.³⁵⁷ Opinions in a democracy need not be tangibly rational, but they should not be entitled to legal ratification when they are based on prejudice, false information, or no reason at all.³⁵⁸ The inappropriateness of such ratification is particularly apparent when the effect of such acceptance is the deprivation of the liberty of another. Blind adherence to objective criteria, in order to avoid the evils of subjectivity, is more dangerous than judicial deference to the legislature itself.

The Supreme Court should not have deferred to the legislature because of the alleged lack of objective tools to evaluate Rummel's claim. It should have reviewed Rummel's case, recognizing the Court's counter-majoritarian role, presuming the legitimacy of the legislative action, and being careful not to act in a "pigheaded" fashion.³⁵⁹ It should have ana-

351. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 325 (1957).

352. *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring).

353. *Rochin v. California*, 342 U.S. 165, 172 (1952).

354. Justice Cardozo observed that the social interest of precedent must be balanced by the judge against the "social interest served by . . . fairness." B. CARDOZO, *supra* note 236, at 113. "If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself." *Id.* But, Justice Cardozo also concedes that:

[E]very one of us has in truth an underlying philosophy of life There is in each of us a stream of tendency, . . . which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize . . . have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, . . . which, when reasons are nicely balanced, must determine where choice shall fall.

Id. at 12. A judge's finding of "ultimate decency in a civilized society," therefore, cannot be fully answered outside the context of the judge's own perspective on life.

355. See notes 281-84 *supra* and accompanying text.

356. *E.g.*, *Gregg v. Georgia*, 428 U.S. 153, 180-82 (1976).

357. Rossi, *supra* note 265. In the Rossi study, sale of heroin was viewed as more serious than the assassination of a public officer, and use of heroin was worse than forceable rape of a former spouse. *Id.* at 228. Although reasons can be given for such findings, they are at least plausibly the result of inappropriate considerations.

358. R. DWORKIN, *supra* note 340, at 248-53.

359. L. TRIBE, *supra* note 96, § 8.7, at 455.

lyzed all of the information available, given primary emphasis to the objective material, but searched its own collective heart for resolution of the ethical question. The Court in *Coker* took this approach. Rummel asked for the same consideration, but the Court refused. On the issue of judicial review, the dissent in *Coker* became the slim majority in *Rummel*, without suitable justification for, or even admission of, the change of attitude.

C. Jurisprudential Confusion

1. *Correct Proportionality Analysis.* *Weems* and its progeny call for an end to grossly disproportionate punishment. The *Rummel* Court should not have deferred to the legislature on the application of this doctrine. In order to explain how the Court should have decided the case and to demonstrate the Court's confusion of the jurisprudential doctrines it did confront, one must consider more fully the correct meaning of "proportionality." This consideration is only possible within the context of the nonutilitarian personhood principle construct developed earlier.³⁶⁰

Punishment proportionate to a crime should match the relative degree of culpability and risk of harm represented by each offense. "Gravity" roughly equals the malevolently intended harm done."³⁶¹ The difficulty is deciding what is the relationship of act to actor, or of the harm caused or threatened to the blameworthiness of the actor. As utilitarian values stress the harm, so too, retributive values focus initially on the act. Blame is initially based on the act.³⁶² Evil thoughts are not blameworthy in the retributive system. The harm, either caused or threatened by the act, is the trigger for blame.

Because the principle of personhood requires that we treat the antisocial actor presumptively as a person capable of choice, we initially assume that the antisocial actor was fully accountable or culpable for his acts.³⁶³ In short, the maximum punishment for a crime is fixed by the degree of seriousness of the harm caused or threatened. To the extent that the actor is not fully culpable, however, the punishment must be reduced.³⁶⁴ To do otherwise is to lack compassion for personal distinctions, to blame persons collectively not individually. A natural assumption of the principle of personhood is that a person intends the natural and probable consequences of his acts. If the person has a less blameworthy mens rea, however, the person's culpability is reduced. For example, to the extent that the actor's conduct was less a matter of choice than it was due to intrinsic factors beyond his control, his blame is also less, and the punishment must again be reduced.

What is significant from this structure is that because punishment can-

360. See notes 96-152 *supra* and accompanying text. The following textual discussion is a statement of what a legislature or common law should do, not necessarily what it has always done.

361. van den Haag, *Punitive Sentences*, 7 HOFSTRA L. REV. 123, 125 (1978).

362. R. SINGER, *supra* note 143, at 17.

363. G. FLETCHER, *supra* note 120, § 6.6.2, at 461; H. PACKER, *supra* note 109, at 140.

364. G. FLETCHER, *supra* note 120, § 6.6.2.

not exceed the gravity of the harm, personal culpability cannot aggravate such punishment. Deciding what factors are relevant to punishment and whether they are harm or culpability oriented is consequently necessary. "Harm" causes the societal disequilibrium that fixes the highest punishment. The statute defining the crime denotes the nature of the harm that therefore sets the penalty. The harm may be the killing of a human being, the taking and carrying away of the personal property of another, the forceable sexual intercourse of a man with a woman not his wife, or an attempt of such actions.

More difficult is calibration of this harm. The harm that the act in fact causes to the victim and society is relevant to such calculation. Such harm may be physical, psychological, or moral. There is also a harm to society in conduct that nearly causes additional harm. The crime of "attempt" is thus retributively punishable because it results in societal apprehension and a partial tear of societal fabric.³⁶⁵ Even with consummated harm, additional harm not caused or even "attempted" in a legal sense but which is risked by the actor's behavior may be relevant to the computation of the amount of harm involved. Rape always causes physical contact. Rape also creates a serious risk of psychological or bodily injury. The rapist may fairly be blamed not only for what he in fact did, but for what was foreseeably risked. On the other hand, it is unfair to punish the actor for these risks as severely as if they had materialized. To treat the risked harm and the consummated harm identically is to ignore the different levels of harm committed.

Such calculations of harm have limits. Virtually all acts carry some remote additional risks. When such risks appear bizarre, or too unforeseeable to be considered normal risks of the defined crime, they cannot fairly be treated as a part of the harm that sets the maximum punishment, because the consummation of the risks would be more imputable to factors other than the actor.³⁶⁶ Nor should the "harm" include harm caused by other people who commit the same crime. Drug sales, when committed often by many different people may reasonably risk substantial societal damage. The actor in court, however, is the one on trial, and not drug dealers generally; his act is the one to be punished. To punish the drug seller for the harm that drug pushers generally may cause is to punish on utilitarian grounds and to distribute punishment aggregately, not personally.³⁶⁷

365. *Id.* § 3.3.2, at 144.

366. This conclusion is consistent with traditional theories of proximate or legal causation in criminal and tort law. See generally R. PERKINS, *supra* note 124, at 690-738.

367. This jurisprudential concept is often misunderstood, particularly in the realm of drug trafficking. At times courts have expressly treated the potential collateral crimes that flow from drug sales as relevant harm. *E.g.*, *State v. Mallery*, 364 So. 2d 1283, 1285 (La. 1978); *People v. Broadie*, 37 N.Y.2d 100, 117, 332 N.E.2d 338, 345, 371 N.Y.S.2d 471, 481 (1975). One post-*Rummel* court, however, has explicitly rejected this faulty analysis. In *Terrebonne v. Blackburn*, 624 F.2d 1363 (5th Cir. 1980), the Fifth Circuit noted that although the legislature may set a penalty based on the "danger posed by the normal range of proscribed conduct," *id.* at 1370 (emphasis added), punishment of any individual actor must

Most significantly to Rummel's case, however, "harm" cannot include harm previously caused by an actor, or harm that he may cause later. Retribution looks backward at the harm caused, and not at future dangerousness, nor at prior crimes for which the actor has already been punished and thereby returned to moral equilibrium. To include previously committed crimes or evidence of general dangerousness within the assessment of harm is to punish more than the current amount of societal disequilibrium. The now innocent part of the actor would be punished.

The factors pertaining to blameworthiness or culpability are more easily stated. One looks only at factors that indicate the actor is not fully accountable for the harm: (a) he did not cause it; (b) he committed it unintentionally; or (c) he suffered from some internal condition that rendered his action less blameworthy. The person's general character is irrelevant. Poor character may evoke a utilitarian concern of dangerousness. It may make us like or respect the actor less. It does not, however, justify a more severe punishment. Good character, as well, may make us like the actor more. We may want to show him mercy because of such positive attributes. We may, therefore, demonstrate such leniency by punishing him less than justly required, but just punishment is punishment based on the act and not the character. Character is not a mitigating circumstance and punishment is not mitigatable based on character assessment. Lesser punishment may only be defended on grounds of mercy, not justice.³⁶⁸ The relevant mitigating characteristics are those internal factors that make a specific criminal act less blameworthy.

Analysis of the habitual offender flows easily from this philosophical construct. Punishment of the recidivist must be justified by nonutilitarian principles. Within the retributive context the habitual offender commits no greater harm as a result of his status as a recidivist. His persistence, at most, tells us something negative about his character—that he is unable to resist committing crime³⁶⁹—but this propensity cannot be the basis for aggravating his punishment. The harm caused by a recidivist's crime is no greater than that of a first offender, so aggravation beyond the maximum sentence set for that crime is retributively unjustified. Society is not harmed by his defiant character. It is harmed by the crimes committed. A recidivist statute that permits punishment in excess of the maximum permissible for the last committed crime, assuming that the punishment set for the last committed crime was as high as permissible under the proportionality doctrine, thereby authorizes disproportionate punishment.

Critics may argue that the principle of personhood so interpreted leaves a society helpless to deal with crime, and it frustrates a legal system that has as its general justifying aim a utilitarian desire to prevent crime. No

be proportional to *his* caused harm. "[W]e cannot sweep into our analysis the harm posed by the conduct of others." *Id.* The alternative approach "necessarily eliminate[s] the proportionality principle as applied to individual cases." *Id.*

368. See note 114 *supra*.

369. This persistence, however, may tend to prove the opposite; that is, a legally cognizable psychological infirmity that would serve to mitigate punishment.

easy, or necessarily satisfying, answer to this concern exists. The principle of personhood does undercut utilitarian goals, a price we pay for a generally libertarian, nontotalitarian state. The criticism, however, is overstated. First, the principle of personhood hardly leaves a society helpless. It may result in some cases of punishment that are not maximally efficient for utilitarian purposes, but proportionate punishment still should have a substantial deterrent impact. The harm of serious crimes is sufficiently great that the proportionate punishment is still severe.³⁷⁰ Secondly, current scientific literature supports the claim that in many cases certainty and celerity, not amount, of punishment is most effective under the utilitarian approach.³⁷¹ Thirdly, the better way to deter crime is to ameliorate its causes, not punish its effects. The principle of personhood can serve as an incentive to refocus the efforts to prevent crime. Fourthly, within the legal context of this society, although the precept of justice is that punishment be proportionate, case law interpretation of the eighth amendment has only invalidated punishment that is grossly disproportionate. Intentionally or unintentionally, properly or improperly,³⁷² this standard gives the society some utilitarian leeway. Fifthly, the principle of personhood does not necessarily prevent the treatment of recidivists differently from first-time offenders. Although aggravated punishment of recidivists violates the personhood principle, old habitual offender laws, such as that involved in *Moore*,³⁷³ wherein recidivists are mandatorily punished the maximum permitted for a single crime, would not violate the principle on its face, because such punishment does not exceed the amount deserved for the harm caused.

2. *Correct Analysis of Term "Gross."* The eighth amendment has been interpreted to punish grossly disproportionate punishment, not merely disproportionate punishment. *Weems*, however, did not use the term "gross." The precept of justice set forth in *Weems* required merely that punishment be proportionate. The term "gross" was apparently first used in a dictum in *Gregg v. Georgia*³⁷⁴ and has been restated since.³⁷⁵ The Supreme Court has not explained the addition or defined the term, nor have commentators given it scholarly attention. Correct analysis of a proportionality case,

370. The author's approach is consistent with prior judicial policy in Great Britain, according to Glanville Williams. Williams, *The Courts and Persistent Offenders*, 1963 CRIM. L. REV. 730, 733. Williams believed, as well, that most maximum sentences in that country made the enhancement of recidivist laws unnecessary for utilitarian reasons. *Id.* at 738.

371. J. ANDENAES, PUNISHMENT AND DETERRENCE 49-65 (1974); F. ZIMRING & G. HAWKINS, DETERRENCE 194-203 (1973); California Assembly Committee on Criminal Procedure, Progress Report, Deterrent Effects of Criminal Sanctions 25 (May 1968), *quoted in* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 23 (1975).

372. See notes 374-82 *infra* and accompanying text.

373. *Moore v. Missouri*, 159 U.S. 673 (1895).

374. 428 U.S. 153, 173 (1976).

375. *Lockett v. Ohio*, 438 U.S. 586, 624 (1978) (White, J., dissenting); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Estelle v. Gamble*, 429 U.S. 97, 103 n.7 (1976).

therefore, requires an understanding of this judicial gloss on the precept of justice.

Working from a clean slate, the term "gross" could have three meanings. First, it could mean "substantially greater" in a quantitative sense. Thus, if a decision is made that proportionate punishment for crime *X* is *Y* years in prison, then *Y* plus one year in prison might be disproportionate while *Y* plus five years would be grossly disproportionate.

Secondly, "gross" could more narrowly mean "obvious" or "immediately apparent." The first interpretation requires a two-step analysis: deciding how many years of punishment is proportionate, and then deciding whether the punishment, if disproportionate, is greatly so. The second interpretation requires only one step: punishment would not be unconstitutional unless the disproportionality is immediately apparent without sophisticated analysis. A punishment grossly disproportionate under this test would clearly violate the former interpretation, but the opposite is not necessarily true. Proportionate punishment for theft might be twenty years. Thirty-five years might be greatly disproportionate, but that fact may not be obvious unless one conducts a careful inter- and intrajurisdictional analysis. If the death penalty were mandated for theft, however, the punishment would be obviously disproportionate without further analysis. Punishment grossly disproportionate under this interpretation would be punishment that "shocks the conscience" and requires no further elaboration.

The third and most dramatic interpretation of "gross" is one that permits utilitarian factors to be considered. The Court could intend the use of the term to permit greater punishment than is retributively proportionate to the extent that the punishing jurisdiction can offer good utilitarian reasons for so doing. This interpretation would be attractive to those who are unnecessarily concerned that proportionality severely limits the state's ability to combat crime.³⁷⁶ According to this view, a defendant would be required to demonstrate that the punishment was disproportionate, and the burden could then shift to the state to offer utilitarian justifications for its greater punishment.

This third interpretation of "gross," however, is inappropriate on grounds of precedent, principle, and practicality. First, such an understanding conflicts with a reasonable interpretation of *Coker* and its two alternative tests of excessiveness,³⁷⁷ because this interpretation of "gross" renders the two prongs duplicative. Therefore, one prong will always be sufficient to adjudge the matter of excessiveness. In a jurisdiction in which retribution is the general justifying aim of the criminal law, any punishment grossly in excess of what is retributively required, and thus in viola-

376. See notes 370-72 *supra* and accompanying text.

377. The two-prong test of *Coker v. Georgia*, 433 U.S. 584 (1977), is that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592; see note 295 *supra* and accompanying text.

tion of the proportionality prong, would also automatically violate the other prong because such punishment would make "no measurable contribution to acceptable goals of punishment" in a jurisdiction in which the acceptable goal of punishment is retribution. Likewise, in a jurisdiction in which a general justifying aim of the criminal law is utilitarian in nature, the duality of tests is again unnecessary. Under this interpretation of the term "gross," "grossly disproportionate punishment" means "disproportionate punishment unjustified by the general justifying aim of the utilitarian system." This interpretation means that the excess punishment, punishment above the proportionality line, serves no measurable utilitarian purpose. Grossly disproportionate punishment will thus always violate the other prong. If the alternative prongs are each to have independent value, "gross" must be understood in a nonutilitarian fashion.

This interpretation also conflicts with the holding of *Weems*. If retributively excessive punishment is not grossly disproportionate because of the fact that it is justified on a utilitarian basis, the proponents of this approach claim thereby that disproportionate punishment can be just punishment. *Weems*, however, held that a precept of justice is that punishment be proportionate, not that it "not be grossly disproportiona[te]." Although an argument can be made that personally unjust punishment is societally just,³⁷⁸ this conclusion cannot be derived from the lesson of *Weems*.

Secondly, such an interpretation of the term "gross" is nonprincipled. If excessive punishment is not justifiable as a matter of precedent, an argument could be made that it is excusable when it is predicated on utilitarian factors. A defense of this interpretation of "gross" would run similar to the views expressed by Bickel in another context: "No good society can be unprincipled; and no viable society can be principle-ridden."³⁷⁹ Such a concern is overstated in this context.³⁸⁰ More relevantly, such an interpretation of "gross" combines principle with instrumentalist policy. Like water and oil, policy and principle do not mix well. Under this interpretation of the term "gross," the principle of personhood is limited by utilitarian policy. The tail wags the dog. The proportionality concept becomes valid only to the extent that it does not conflict with utilitarian goals. In effect, the proportionality principle becomes an instrumentalist-based concept.

Finally, such an interpretation also raises practical problems unrelated to questions of principle. Under this view, the state would have to justify the disproportionality on utilitarian grounds. Courts would be required to intrude into legislative policy, exactly the area from which they now shy, and such an intrusion would involve issues of greater complexity than the evaluation of proportionality as a conventional morality.

"Gross," therefore, should not be interpreted to mean "unjustified by

378. See note 147 *supra*.

379. A. BICKEL, *supra* note 336, at 64.

380. See text accompanying notes 370-72 *supra*.

notions of utilitarianism."³⁸¹ The term has been grafted onto the eighth amendment principle of proportionality presumably not because disproportionality is just while gross disproportionality is unjust, but because the Court concedes that reasonable minds can differ as to where proportionality ends and disproportionality begins. Because of the presumptive constitutionality of legislative action and the Court's desire to be deferential, it must have intended "gross" to suggest that punishment is not unconstitutional until the punishment differs from the appropriate amount so sufficiently that the Court can feel reasonably satisfied that the legislature was wrong in its action and that the judiciary is correct.³⁸² The precept of justice requires proportionality, but deference requires substantial disproportionality before the Court will feel satisfied that the precept was violated.

In light of the foregoing discussion, "gross" is a misnomer. A preferable approach would have been for the Supreme Court to have adhered to the *Weems* language and to have held that the eighth amendment condemns all disproportionate punishment, but that a defendant must meet a heavy burden to prove that the precept was violated.

3. *Errors in Rummel.*

a. *Jurisprudential Analysis.* *Rummel* is riddled with jurisprudential error. Although the majority opinion in *Coker* was generally a jurisprudentially solid opinion,³⁸³ Justices Rehnquist and Burger in dissent demonstrated substantial error.³⁸⁴ *Rummel* is *Coker*'s dissent memorial-

381. The choice of which of the first two meanings of "gross" is appropriate is not a matter of philosophical import. The second meaning, however, is in one respect more consistent with concepts of deference as it will less often involve analysis of legislation. It also is consistent with the attitude of laziness demonstrated by this Court. See note 348 *supra*. On the other hand, this test can result in more subjective, intuitive analysis. See notes 448-49 *infra* and accompanying text.

382. This view is consistent with the proportionality doctrine as first conceived, although not born, in the dissent in *O'Neil v. Vermont*, 144 U.S. 323, 337 (1892) (Field, J., dissenting): The eighth amendment prohibits "all punishments which by their excessive length or severity are *greatly* disproportioned to the offences charged." *Id.* at 339-40 (emphasis added). It also seems consistent with *McDonald v. Commonwealth*, 173 Mass. 322, 53 N.E. 874 (1899), *quoted in* *Weems v. United States*, 217 U.S. 349, 368 (1909) ("so disproportionate . . . as to constitute cruel and unusual punishment").

383. The *Coker* opinion properly analyzed the seriousness of rape. It included as harm the moral injury to the victim, as well as those injuries that "normally" and "very often" occur. *Coker v. Georgia*, 433 U.S. 584, 597-600 (1977). It also was sensitive to the importance of judging the seriousness of rape from its statutory definition and not from hypothetical possibilities. *Id.* at 598. Most significantly, it excluded utilitarian factors from its analysis. *Id.* at 599.

384. The dissent's most notable error was its failure to separate proportionality analysis from utilitarian values. In numerous places it justified the constitutionality of *Coker*'s penalty on utilitarian grounds. 433 U.S. at 608-10, 617-18. The dissent also demonstrated unsound proportionality analysis when it claimed that proportional punishment of a thief would require only that the thief return the money. *Id.* at 619 n.16. Proportional punishment, however, is punishment symbolically equal to the harm caused by the crime. Symbolically proportional punishment of a thief would include the harm to the victim, including his lost use, and harm to society. The dissent's analysis ignored this.

ized as a majority opinion. The error now becomes the collective blame of the Court.

Most basically, Justice Rehnquist's opinion in *Rummel* demonstrates a utilitarian approach to proportionality. He rejected Rummel's characterization of his crime as petty because of its nonviolence, partly because "absence of violence does not always affect the strength of society's interest in deterring a particular crime."³⁸⁵ He also accepted the validity of enhanced punishment of recidivists because of the state's interest in punishing more severely those "incapable of conforming to the norms of society."³⁸⁶ The opinion demonstrates a total lack of awareness of the distinction between retributive and utilitarian factors.³⁸⁷

Justice Rehnquist also failed to understand the aggravating/mitigating features of proportionality. He suggested that only a subjective line can be drawn between the attempted defrauder and the successful one. The former is "no less blameworthy, only less skillful."³⁸⁸ This conclusion is true and has been offered as a frequent scholarly criticism of the tradition of punishing attempts less seriously than completed crimes. Such criticism, however, is largely premised on utilitarian grounds.³⁸⁹ Such differential punishment is generally accepted as justifiable on retributive grounds.³⁹⁰ As the proportionality doctrine is retributively based, reduced punishment for attempt is analytically justifiable. As noted earlier, when the harm is less, punishment must be less; risked harm, although punishable, is less serious than completed harm.³⁹¹

385. 445 U.S. at 275.

386. *Id.* at 276.

387. Even Justice Powell's dissent was somewhat in error. Although his opinion alone noted the importance of distinguishing between retributivism and utilitarianism, he viewed utilitarianism as a proper, albeit limited, factor, and agreed that Rummel's recidivism was properly considered. *Id.* at 301. He also seemed to contend that utilitarian justification by Texas would save the statute from a disproportionality claim. *Id.* at 302. His comment that the statute was irrational, implied, as well, that a rational punishment is sufficient. *Id.* at 307. This conclusion is false. The punishment must not only be rational, but decent. See note 162 *supra* and accompanying text.

388. 445 U.S. at 276.

389. Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 25 BUFFALO L. REV. 1, 16-22 (1925).

390. H. HART, *supra* note 114, at 130; Allen, *supra* note 389, at 13; Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 966-69 (1930).

391. The Court's claim that Rummel's "seriousness of offense" argument is subjective is similarly unpersuasive. The fact that a bright line is absent between theft of \$500 and theft of \$501 does not mean that one does not exist between \$500 and \$5,000,000. Other less significant errors are noteworthy. First, Chief Justice Burger erroneously stated in oral argument that the proportionality concept was introduced in the death penalty cases. Oral Argument, *supra* note 1, at 18. Secondly, the Court's comments about prosecutorial discretion being used to screen out "truly 'petty' offenders" is arguably wrong. See note 81 *supra* and accompanying text. It is not clear how prosecutors can screen out such "truly" petty cases if such a label is inherently speculative. The fact that prosecutors do not enforce the recidivist laws in most cases may prove only that the laws are usually too extreme. The courts should not rely on the prosecutors to do the job of assuring fairness. See *Beck v. Alabama*, 444 U.S. 897 (1979) (jury discretion does not take the place of properly worded jury instructions in death penalty cases). Moreover, there is much reason to suspect that recidivist laws are used as often by prosecutors to pressure suspects to plead guilty as to screen out petty cases. *E.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). In any case, it does not follow that because a

b. *Proper Analysis of Rummel's Petition.* The Court should have attempted to decide the range of proportionate punishment for first-time theft. Enhancement beyond the maximum proportionate punishment would obviously be disproportionate. Substantial disproportionality would constitute a violation of the eighth amendment. The Court should have tried to analyze it in as objective a fashion as possible, but without fear of using nonquantitative data, even though this approach necessitates some subjectivity. It should have remained cognizant, however, of the historical importance of allowing states the freedom to experiment and to be unique.

Interjurisdictional analysis is less subjective than intrajurisdictional analysis because the latter requires understanding the seriousness of an offense, which is generally a nonquantitative matter. On the other hand, interjurisdictional analysis potentially runs afoul of valid concepts of federalism. Complete protection of concepts of federalism and separation of powers is difficult, however, without abdication of the protection of individual eighth amendment rights. In order to balance these conflicting interests, the Court should have used the following approach.

The first test of disproportionality, one which does not conflict with values of separation of powers or federalism, is that for a state to punish a lesser-included crime more severely than the basic crime is disproportionate punishment. If the disproportionality is statistically great, such punishment would also be grossly disproportionate. As no valid basis can exist for such a legislative occurrence, and as such a finding can be resolved in an entirely objective fashion, a court should start with such an analysis. Because such a process violates neither separation of powers nor federalism, the burden upon a defendant to prove such a case should be relatively small.

If there is no violation of this rule, an interjurisdictional analysis of penalties should be attempted. The test would be objective. Federalism is protected, although imperfectly, by the requirement of gross disproportionality. Because of the federalism problem, however, the burden on the defendant to prove disproportionality should be greater than under the primary approach. A court should compare the penalties for the equivalent crime in other jurisdictions in order to ascertain society's view of the proportionate punishment. The mean and mode interjurisdictional punishment is relevant, although not determinative, under this analysis.³⁹² The average punishment tells something about national evaluation of the seriousness of a crime. The mode, too, speaks to the numerically most common attitude regarding its seriousness. The court should be sensitive,

prosecutor may often fulfill his screening function, and that, as a result, he usually prosecutes only nonpetty cases, that therefore any individual case prosecuted is nonpetty. Justice Stewart described the Texas procedure to be "uncontrolled, uncontrollable, and standardless discretion" which is unappealable. Oral Argument, *supra* note 1, at 38-39. See also note 286 *supra* for other substantive errors or intentional distortions by the Court.

392. The median is not useful, of course, because by definition half of all tested jurisdictions necessarily must be above the median.

as well, to clusters of punishment in a given range. On the basis of these factors the court should be able objectively to set the presumptively proportionate punishment. Any punishment higher than that figure would be presumptively disproportionate. If the actual punishment is substantially greater than that figure it would also be presumptively grossly disproportionate. Such a finding of unconstitutionality, however, should be rebuttable by the state. It could demonstrate, for example, the existence of unique nonutilitarian circumstances in a region that make the seriousness of the crime more severe in that part of the country and thereby show the need for local or regional jurisdictional analysis.³⁹³

Just as the interjurisdictional proportionality figure may be rebutted by the state, so, too, should a finding of proportionality, or a finding of no gross disproportionality, be rebuttable by the defendant. A defendant may be objectively able to demonstrate that interjurisdictional proportionality analysis is inappropriate because the premise on which such analysis is ordinarily based is invalid. Interjurisdictional evaluation only works if one can assume that states as a whole set punishment in an unprejudiced fashion. Laws may have been written during an historical period of passion or prejudice, however, since which time there may have been objective verifiable changes in attitudes regarding the seriousness of the crime,³⁹⁴ or the crime generally may be one peculiarly subject to prejudice and emotionalism.³⁹⁵ If any of these situations are proved by the defendant, the presumptive finding of interjurisdictional proportionality might be rebutted.

The final analysis, application of its own judgment, is an approach that the Court must conduct in any case in which the first two techniques result in a conclusion of *non*gross disproportionality or in an unclear result. Because this test is nonquantifiable and far more subjective, the burden on the defendant should be heavy. Because a quantifiable approach is not involved, this process should also require a finding of "immediately apparent" disproportionality.³⁹⁶ Under this approach the Court would apply the proper proportionality analysis of harm and blameworthiness and decide whether the punishment inflicted is so obviously excessive that it shocks the court's conscience and should therefore be viewed as unconstitutional.

Texas's treatment of Rummel would be unconstitutional under this ap-

393. For example, in a state whose economy may be agricultural, injury to farm land may be deemed more harmful to society than similar injury in a predominately industrial community. A state may also empirically prove that its populous views some crimes as substantially more egregious than the nation as a whole. *But see* note 395 *infra* and accompanying text.

394. The laws pertaining to airplane hijacking, for instance, were written during a time of very frequent hijacking; the penalties established under these laws may be hard to justify in calmer times. Similarly, a modern jurisdiction that continued to impose the penalty of hanging for the crime of horse theft should not be able to justify the law on the basis of the supreme importance of the horse in the era of enactment.

395. Crimes pertaining to homosexual conduct are indicative.

396. *See* p. 1110 *supra*.

proach. Texas itself set the maximum punishment for Rummel's third crime at ten years. As Rummel's recidivism is irrelevant, the life imprisonment meted out is certainly grossly disproportionate using such an intrajurisdictional approach.³⁹⁷ Applying an interjurisdictional approach, the mean maximum punishment for obtaining \$120.75 by false pretenses among the thirty-five states treating it as a felony was 8.5 years.³⁹⁸ It is obviously less if one includes those states that treat it as a misdemeanor. The mode is ten years.³⁹⁹ Life imprisonment is substantially greater than either of those figures. Even if one accepted the Court's assumption of the validity of enhancement of recidivists' punishment, proper interjurisdictional analysis would still result in a presumed finding of gross disproportionality. In twenty-nine states no enhancement would have been possible in Rummel's case. In the forty-seven states in which terms of years are set, the mean maximum mandatory punishment would have been approximately seven years.⁴⁰⁰ Only two other states punish recidivists like Texas does. Since Texas did not offer in rebuttal special circumstances to discount these findings, Texas's treatment of Rummel should have been considered unconstitutional, even with jurisprudentially incorrect allowance of recidivist enhancement.

D. *Inappropriate Adversarial Arguments*

The briefs filed by the parties were well-written, demonstrating thorough legal research. Rummel's brief in particular was outstanding. It was extensively researched, including a monumental 204-page supplementary brief cataloging habitual offender laws in all fifty states from 1776 until 1980. The brief thus made available to the Court all the objective historical evidence necessary for it to consider the issue. Rummel also cited much legal and penological literature critical of the policies underlying the habitual offender laws.

Nonetheless, as in other lines of cases implicating distributive justice, the

397. Rummel's possibility of parole in 12 years cannot make this case one of "12 years for a three time felon." Even Rehnquist acknowledged this fact. 445 U.S. at 280. Justice Rehnquist would not, however, ignore the possibility, "however slim," that Rummel might be released early. *Id.* at 281. The effect of such a treatment is necessarily to complicate the analysis. See note 424 *infra* and accompanying text. Release on parole is generally not a constitutional right. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979). Rummel's legal right to be released before he dies is no greater than the right of a death row inmate to be pardoned. See 445 U.S. at 294 (Powell, J., dissenting). Moreover, as the attorney general of Texas conceded in oral argument, even if paroled, Rummel might be returned to prison for the rest of his life for a traffic violation. "Yes sir, it can be for any violation of the law, no matter how trivial." Oral Argument, *supra* note 1, at 31. Under such circumstances, the Court should have realistically treated Rummel's sentence as life imprisonment. Indeed, if Rummel was sentenced to life because he could not conform his conduct to the law, it makes little utilitarian sense to release him early. This approach is used by most courts. Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1128 (1979).

398. This figure is based on averaging the maximum penalties. 445 U.S. at 269 n.9.

399. *Id.* at 270 n.10.

400. These figures are based on calculations using the information presented by Rummel in his 204-page supplementary charts presented to the Court.

concepts of the principle of personhood were not always handled properly by the parties, and adversarial strategy may have negatively affected the result. Neither party instructed the Court regarding the nonutilitarian nature of proportionality. Not surprisingly, Texas argued that utilitarianism was a valid issue in the case.⁴⁰¹ Rummel, however, did not rebut this argument, and, in view of his concession regarding recidivist laws, appeared to agree generally with this faulty premise.⁴⁰² By conceding the validity of recidivist-enhancement statutes, Rummel thereby lost the opportunity to force the Court to confront its previously poorly analyzed recidivist cases. He failed to educate the Court regarding the nonutilitarian features of the principle of personhood. Moreover, Rummel's second concession, in which he granted that Texas could treat false pretenses as a felony, served to undercut his case further. Once he conceded that Texas could treat false pretenses as a felony and could also enhance the punishment, he gave the state too much. He conceded more than was necessary as a matter of principle and, crucially, more than he could strategically afford to concede because his dual concessions blurred considerably the line between what Texas could do and what it did do. The concessions made it possible for Justice Rehnquist to treat Rummel's claims as almost *de minimis*.

Although it was not pointed out in the opinion, Rummel philosophically also gave up too much on the issue of judicial deference. Rather than calling on the Court to protect the principles of personhood in all cases, he told them in argument that they "ought not to consider the issue"⁴⁰³ of proportionality if his crimes had involved violence, drugs, or tax violations, or any other crime involving a "peculiarly strong [state] interest."⁴⁰⁴ Even if he meant only that a finding of gross disproportionality would be inappropriate in such a case, this concession was unnecessary and very possibly wrong.⁴⁰⁵

V. THE FUTURE

A. *Proportionality and the Legislature*

Rummel did not overrule *Weems*. It is still a precept of justice that punishment be proportionate to the severity of the offense. In addition, *Rummel* did not invalidate the nonconstitutional principle of personhood.

401. Respondent's Brief, *supra* note 294, at 13-18.

402. Petitioner's Brief, *supra* note 15, at 27, 29; Oral Argument, *supra* note 1, at 7, 9, 17.

403. Oral Argument, *supra* note 1, at 6.

404. *Id.* at 6, 8.

405. It bears reiteration that the author in no way is questioning the competency or dedication of Rummel's appellate counsel. To the contrary, counsel excelled in both categories. Rather, the author is making two points. First, factually, and with hindsight, it is clear that Rummel's concessions served as an excuse by the Court to avoid confronting head-on its previously questionable decisions. Secondly, counsel either accepted, incorrectly, in the author's opinion, the philosophical premise that punishment of recidivists may be enhanced, or, more plausibly, chose not to attack this commonly held misconception. It is the author's belief, however, that lawyers should, whenever possible, force courts to question such a philosophical premise. Otherwise, substantive criminal law doctrine will remain as decadent as Professor Packer has previously accused it of being. Packer, *supra* note 179, at 121.

Legislative bodies, therefore, should still seek to set punishment consistent with these concepts. The effect of *Rummel* ought to be to increase the pressure on conscientious legislative bodies to ensure such proportionality. The "source and its sustaining force" of proportionality⁴⁰⁶ must be in the legislature. The legislature can no longer act with the assurance that judicial review will prevent excesses.

B. *Proportionality, the Judiciary, and Imprisonment*

After *Rummel* judicial enforcement of the proportionality doctrine in cases attacking the length of a person's incarceration is unlikely. Nonetheless, an attorney should not forego such a legal argument. Although the ambiguities of the opinion in *Rummel* make predictions highly speculative, a careful reading offers a few hints.

In a *Rummel*-type case insufficient objective criteria exist by which a federal court can enforce the proportionality doctrine against a state statute, and therefore the Supreme Court will not intervene to declare unconstitutional a state statute in such a case. The question is, however, what is a *Rummel*-type case? *Rummel* may be characterized as a "length of incarceration" case, but enigmatic footnote 11 explains that the proportionality doctrine "comes into play" in some length-of-incarceration situations.⁴⁰⁷

1. *Recidivist Laws.* Habitual offender laws are more nearly immune from constitutional scrutiny, particularly on a proportionality ground, than regular incarceration statutes. This situation was evident prior to *Rummel* in light of the Court's previously cavalier treatment of such legislation.⁴⁰⁸

406. Perhaps the ambiguities will encourage lower courts to conduct end-sweeps around the *Rummel* opinion. Early published results of post-*Rummel* litigation are as inconsistent as the opinion itself. Various courts have interpreted *Rummel* generally to exclude judicial intervention in non-death-penalty proportionality cases. *E.g.*, *Chapman v. Pickett*, 491 F. Supp. 967, 974 (C.D. Ill. 1980); *State v. Smith*, 268 S.E.2d 276, 277 (S.C. 1980). Two other jurisdictions, however, not only interpreted *Rummel* as permitting judicial oversight, but chose to continue such scrutiny. *Terrebonne v. Blackburn*, 624 F.2d 1363 (5th Cir. 1980); *State v. McDaniel*, 228 Kan. 172, 612 P.2d 1231 (1980).

Terrebonne went so far as to conclude that *Rummel* permits continued application by the Fifth Circuit of the three-prong test used in *Rummel*. 624 F.2d at 1368. Although the opinion was jurisprudentially sound, *see* note 367 *supra*, this interpretation of *Rummel* is incorrect. It quoted the Court's acceptance of interjurisdictional analysis as not inherently flawed, *see* note 82 *supra* and accompanying text, but it ignored both the Court's apparent rejection of the intrajurisdictional and "seriousness of offense" tests, *see* notes 65-73 *supra* and accompanying text, and its refusal to permit any result that violates principles of federalism. *See* note 83 *supra* and accompanying text.

407. 445 U.S. at 274 n.11; *see* note 55 *supra* and accompanying text.

408. The general constitutionality of recidivist laws has been regularly upheld. *Gryger v. Burke*, 334 U.S. 728 (1948) (double jeopardy, *ex post facto*); *Graham v. West Virginia*, 224 U.S. 616 (1912) (eighth amendment, double jeopardy, privileges and immunities clause); *McDonald v. Massachusetts*, 180 U.S. 311 (1901) (eighth amendment, double jeopardy, *ex post facto*); *Moore v. Missouri*, 159 U.S. 673 (1895) (eighth amendment, double jeopardy).

The constitutionality of particular recidivist laws was litigated in *Oyler v. Boles*, 368 U.S. 448 (1962) (no violation of due process or equal protection); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (involuntary sterilization violated equal protection clause); *Graham v. West Virginia*, 224 U.S. 616 (1912) (no violation of equal protection); *McDonald v. Massachusetts*,

Rummel does nothing to dispel this attitude. The Court does not expressly claim, however, that all recidivist statutes are immune from its eighth amendment proportionality scrutiny. Indeed, it did appear to scrutinize *Rummel*'s claim by evaluating the voluminous evidence presented before it deferred. The point at which a criminal becomes a recidivist and the length of incarceration imposed are "*largely* within the discretion of the punishing jurisdiction."⁴⁰⁹ By the use of the word "*largely*" rather than a word such as "*solely*," the Supreme Court appears to have left a door open.

As a practical matter, however, if any door is nearly closed it is the assailability of recidivist statutes. *Rummel* had conceded the validity of the Texas recidivist law and such laws generally. In light of this concession, the Court did not even have to make as broad a statement regarding legislative discretion as it did. The fact that the Court went out of its way to express its opinion regarding discretion suggests that the Court will not look favorably on litigation in this area.

Theoretically, however, two basic legal strategies exist. First is a reeducational strategy. The Court's statement regarding the validity of habitual offender legislation was based on the false premise that utilitarian factors were relevant. A lawyer could try to prove to the Court that *Rummel* was based on such a false premise and thereby persuade one of the Justices in the slim majority of five to change his vote. More plausibly, but still unlikely, those who wish to see such laws declared unconstitutional could look for objective criteria. The Court says there remains "*little*"⁴¹⁰ in the way of objective standards to judge their constitutionality, thus implying that a possibility might remain. In light of this comment, any recidivist law that enhances the penalty for true felonies will not likely be undermined on the grounds of intrajurisdictional or "seriousness of offense" analysis. The Court did, however, appear to accept interjurisdictional analysis as valid. This approach was rejected in *Rummel* only because the distinctions proved were "subtle rather than gross,"⁴¹¹ and because, due to federalist concerns, the interjurisdictional evidence could not be used alone to declare a penalty unconstitutional.

A lawyer, therefore, would have to meet both the subtlety and federalism objections in order to succeed in an objective criteria challenge. Yet a

180 U.S. 311 (1901) (no violation of equal protection); *Moore v. Missouri*, 159 U.S. 673 (1895) (no violation of equal protection).

Particular procedural regularities surrounding such laws were litigated in *Spencer v. Texas*, 385 U.S. 554 (1967) (no violation in procedure of telling jury during trial of recidivist allegation); *Chewning v. Cunningham*, 368 U.S. 443 (1962) (right to counsel violated); *Reynolds v. Cochran*, 365 U.S. 525 (1961) (violation of right to counsel of his own choosing); *Chandler v. Fretag*, 348 U.S. 3 (1954) (violation of right to counsel of his own choosing); *Gryger v. Burke*, 334 U.S. 728 (1948) (no violation of right to counsel); *Graham v. West Virginia*, 224 U.S. 616 (1912) (no violation although recidivism alleged in information, not indictment).

409. 445 U.S. at 285 (emphasis added).

410. *Id.* at 281.

411. *Id.* at 279.

recidivist statute more susceptible to an objective, bright line finding of excessiveness than the Texas law as it was applied to William Rummel is hard to imagine. The Court's list of the factors that made the distinction in Rummel's case "subtle rather than gross" would likely be present in all cases today, because the subtlety of Rummel's case inhered in no more than the nonuniformity of such laws, combined with the "role of prosecutorial discretion in any recidivist scheme."⁴¹² The Court also seemed to place an intolerably great burden on the defendant when it said that it was "not entirely convinc[ed]" by the evidence.⁴¹³ Interjurisdictional analysis, therefore, is not a realistic bright line tool in felony-recidivist cases at this time. It might become a viable analysis at some future date, however, if, for example, a legislature were to enact an habitual offender law that mandated life imprisonment without possibility of parole for any two felonies. This punishment could meet the bright line requirement in a case in which the two felonies were particularly minor, especially if they were of a strict liability nature as in *Weems*, so that they could be labeled "trivial."⁴¹⁴

Even if such a harsh law were enacted, however, it would not be ruled unconstitutional unless the lawyer could find additional objective support for its unconstitutionality. An answer may be found in footnote 22 of the opinion, in which Justice Rehnquist distinguished *Rummel* from *Coker* by noting that the former lacked "contemporary expression of legislative or public opinion on the question of what sort of penalties should be applied to recidivists."⁴¹⁵ Such objective evidence, especially in conjunction with interjurisdictional figures, might support a finding of unconstitutionality. Public opinion polls could serve to fulfill the need for adequate objective support of public attitude. Justice Powell believed that such a poll would have demonstrated the unfairness of Texas's treatment of Rummel.⁴¹⁶ Nevertheless, two problems exist. First, polls by national organizations on this subject are unlikely. Secondly, even if conducted, polls are quickly outdated and not apt to answer with enough specificity how a given case should be resolved. Another source of objective support would be evidence of rapid legislative repeal of such laws. At this time, such evidence is not likely to be found. Current felony-recidivist laws, then, are as a practical matter presently unsusceptible to proportionality rejection, but they remain subject to theoretical criticism and possible successful litigation at some future date.

412. *Id.* at 281.

413. *Id.* at 278. The Attorney General suggested a more amazing burden in such cases: punishment is excessive if a "state legislature so recklessly bent on some course of misconduct and so totally unaware of principles established in modern day civilized society . . . enact[s] some statute so utterly devoid of any rational justification." Oral Argument, *supra* note 1, at 23.

414. This term was used by the *Rummel* Court to characterize *Weems*'s offenses. 445 U.S. at 274.

415. *Id.* at 280 n.22.

416. *Id.* at 307.

2. *Felonies*. Does *Rummel*'s federal court deference apply to nonrecidivist incarceration for all felonies? Despite the Court's "without fear of contradiction" statement,⁴¹⁷ this door is not closed. First, the statement is limited to concededly classified and classifiable felonies. Secondly, footnote 11 expressly assures the play of proportionality in some felony cases.⁴¹⁸ Thirdly, the Court's language says only that an argument could be made for the proposition that the length of felony sentences is a matter of sole legislative prerogative and that such an argument was not contradicted by precedent. It does not say that such an argument was correct. In fact, the Court expressly left open the door when it said that the line between felony and petty larceny was within the state's prerogative "subject only to those strictures of the Eighth Amendment that can be informed by objective factors."⁴¹⁹ Indeed, the Court expressly reserved the issue of whether *Rummel* could have been sentenced to life imprisonment on the basis of his last felony alone.⁴²⁰

Realistically, the possibility of federal court litigation should be more available with regard to concededly classified and classifiable felonies than with regard to recidivist laws.⁴²¹ First, the former case lacks the special legislative utilitarian interest present in recidivist laws; thus, the enhancement factor is not present. If a felony is defined as the Court did, as a crime for which a person may receive "significant terms of imprisonment in a state penitentiary," and in which a significant term of imprisonment can be as few as two or three years,⁴²² then the difference between a conceded felony and the actual punishment can be quantitatively great. A bright line is potentially easier to find.

Secondly, interjurisdictional analysis is not likely to be as complex with nonrecidivist statutes. The only factor that complicates such a process is parole.⁴²³ Not all states, however, have parole. At the least, in parole jurisdictions a court could compare the crime to a punishment figure based on the earliest date upon which a prisoner could be released. In any case, litigation is possible based on the claim that the time the petitioner has already been incarcerated is cruel and unusual punishment.⁴²⁴

Thirdly, intrajurisdictional analysis is not completely ruled out by *Rum-*

417. *Id.* at 274.

418. *Id.* at 274 n.11.

419. *Id.* at 284.

420. *Id.* at 276.

421. Post-*Rummel* litigation indicates that the door is being treated as open in some, but not all, cases. See note 406 *supra*.

422. 445 U.S. at 274.

423. This complicating feature is evident in *Terrebonne v. Blackburn*, 624 F.2d 1363 (5th Cir. 1980), a post-*Rummel* opinion. The petitioner was sentenced to prison for life at hard labor, subject to parole, for a drug offense. The Fifth Circuit Court of Appeals refused to consider statistics offered in the state's appellate brief regarding the likely term that the petitioner would serve. *Id.* at 1369. It remanded the case so that the district court could take evidence on the parole issue. Although the Fifth Circuit conceded that the average term of years for drug offenders is a relevant factor, it considered the inference that the petitioner would serve only that length to require a "logical leap" in reasoning. *Id.* at n.13.

424. *E.g.*, *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

mel, notwithstanding the fact that the opinion directed that such comparison is inherently speculative. At issue in *Rummel* was a recidivist law that made it harder to conduct an intrajurisdictional comparison. The Court pointed to that difficulty as significant.⁴²⁵ One can only compare the habitual offender law to nonrecidivist statutes, a comparison of arguably incomparable items, or undertake a comparison of different individual recidivists punished under the same statute, a necessarily difficult analytical process. In an actual nonrecidivist case, however, it is difficult to believe, and thus unwise to assume, that the Court would treat all intrajurisdictional analysis as speculative. At the least, lesser included offenses must be punished less severely than the basic offense itself. Also, a majority of the current Court would not be likely to claim that rational people disagree as to whether theft of a small amount of money merits greater punishment than, for example, murder by torture. Fourthly, significant research exists concerning public attitudes toward the comparative seriousness of various crimes.⁴²⁶ Additional research in this area is far easier when it does not involve the complicated features of recidivism.

Nonetheless, despite such hopeful distinctions, proportionality challenges to sentences imposed upon felons are not likely to meet great success except in cases involving lesser included offenses. The Court's intrajurisdictional language is particularly discouraging. Its statement that seriousness of an offense is not a line, but a plane, seems to suggest that even the murder by torture/theft line is blurred. Certainly anything much less extreme is apt to be too speculative.⁴²⁷ Without the presence of recent public opinion or social science literature on the subject, a lawyer will confront the same federalism argument that prevents success in recidivist cases.

With felonies not conceded to be classifiable, however, the door has not only not been expressly closed, but seems to be left wide open by the Court. If meaning is to be found for footnote 11, it comes by putting it in its context at the end of a sentence that speaks of "concededly classified and classifiable . . . felonies."⁴²⁸ The Court probably meant that overtime parking is not properly classified as a felony and that if it were the Supreme Court would intervene on a proportionality ground.

How meaningful is this limit to court deference, however? First, even in this "extreme example"⁴²⁹ Justice Rehnquist does not say that gross disproportionality was present. He said only that "[t]his is not to say that a proportionality principle would not come into play."⁴³⁰ This double negative tells us at most that some proportionality principle (perhaps not

425. 445 U.S. at 282-83 n.27.

426. See, e.g., note 265 *supra*.

427. Nonetheless, one post-*Rummel* opinion incorrectly calls for continued use of intrajurisdictional analysis under circumstances not greatly different from *Rummel*. See note 406 *supra*.

428. 445 U.S. at 274.

429. *Id.* at 274 n.11.

430. *Id.*

Weems?) would be applicable, and that the Court would apply such a principle. The Court does not say that life imprisonment for overtime parking is disproportionate punishment, much less that it is grossly so.

Secondly, even assuming that footnote 11 was intended to suggest that a claim of disproportionality would be successful in the extreme example, the extreme example is, indeed, exceptionally extreme. The footnote does not clarify whether punishing the overtime parker for any significant term of years less than life in a state penitentiary would be grossly disproportionate. An arguable line may be drawn between cases of life imprisonment and all lesser terms of years. The lower court in *Rummel* expressly suggested the validity of such a distinction, pointing out that

a sentence to imprisonment for life now stands in the place where the death penalty stood earlier in this century—the ultimate punishment imposed by this society for those crimes most abhorrent to it. Therefore, the question of the proportionality of Rummel's life sentence . . . deserves a consideration which may be unnecessary for a lesser sentence.⁴³¹

Statements made by Justice Stevens in oral argument in *Rummel* indicate that he too may have felt such a line was relevant.⁴³² Also more than coincidence may be the fact that the Court viewed the disproportionality found in *Weems* and *Coker* as "considerably clearer"⁴³³ than any constitutional distinction "between one term of years and a shorter or longer term of years,"⁴³⁴ rather than contrasting those cases with a life sentence.

Such a line, however, is unrealistic. In light of the number of states that still inflict the penalty of death,⁴³⁵ life imprisonment does not stand in the same place as capital punishment. Certainly in a state like Texas, which maintains a large number of persons on death row,⁴³⁶ life imprisonment bears a closer resemblance to a term of years, especially with a possibility of parole. The irrevocability of death also distinguishes the death penalty from life imprisonment, even without parole. Yet, in light of the Court's desire to avoid inherently speculative tests, justifying special treatment for individuals sentenced to life imprisonment in view of the differing ages and speculative life spans of individual prisoners is difficult. A term of years can often be as significant as life imprisonment. Notwithstanding the inappropriateness of such a distinction, however, life imprisonment is obviously a more serious punishment than some "significant [term] of imprisonment," such as a two- or three-year punishment. This latter punishment, even for the overtime parker, might not violate the eighth amendment.

431. 568 F.2d 1193, 1196 (5th Cir. 1978).

432. See, e.g., Oral Argument, *supra* note 1, at 33: "QUESTION (STEVENS): If you did apply proportionality, if the sentence here were properly viewed as a life sentence rather than one of ten or twelve years, would you agree that that would be excessive?"

433. 445 U.S. at 275.

434. *Id.*

435. As of 1979 there were 37 such states. See Dressler, *supra* note 112, at 46 n.183.

436. In 1979, 122 of the nation's 522 to 533 death row inmates were in Texas prisons. *Id.* at 61-62.

Thirdly, not at all obvious is whether the present Court would prohibit life imprisonment for a recidivist traffic offender. Footnote 11, based on an example suggested by Rummel in oral argument,⁴³⁷ involved only a first-time offender. In oral argument, Chief Justice Burger seemed to focus on that fact.⁴³⁸ The Court's particularly deferential attitude in recidivist cases could apply to uphold the punishment in such an example.

Beyond these limits on footnote 11, proportionality cannot serve as a practical limit on legislative action unless one can decide what inherently is a "felony," so that it can be said that a given "felony," punished by life or less, is improperly classified as such, thereby triggering the exception in footnote 11. With the very modern trend toward retributive, morally based legislation, one would expect a strengthening of the line between felonies and nonfelonies. In fact, however, the opposite is the case. At common law the line was clear and manifested the "common sense separation between offenses which [sprang] from wickedness of character and those which [did] not."⁴³⁹ All felonies were *mala in se*.⁴⁴⁰ Nonfelonies were usually *mala prohibita*.⁴⁴¹ Gradually, this line blurred, so that today no such morally based distinction is possible. Some *mala in se* offenses are treated as nonfelonies; some *mala prohibita* laws are, even without a *mens rea*, felonies.⁴⁴² Also, some *mala prohibita* laws no doubt may properly be identified as involving serious harm.⁴⁴³

The definitional line between felonies and petty offenses is now positivistic. A felony is either a crime for which one may be incarcerated in a state prison, as distinguished from a lesser punishment such as incarceration in a county jail or no incarceration, or is based on the length of incarceration no matter what the situs.⁴⁴⁴ Neither definition can serve as a basis for *Rummel* line-drawing, of course. Use of the latter definition to decide a proportionality claim would be circular, and the former is not a meaningful distinction because the stigma of a significant term of years in a county jail is not inherently objectively different from that of an equal term in a state prison.⁴⁴⁵

Because legislatures have lost sight of the common law distinction between felonies and petty offenses, one must look to the Supreme Court for

437. See note 1 *supra* and accompanying text.

438. *Id.*

439. Petition of Schlau, 41 F. Supp. 161, 163 (S.D.N.Y. 1941).

440. R. PERKINS, *supra* note 124, at 9. "Mala in se" means "wrong in themselves." Inherently immoral acts are *mala in se*.

441. *Id.* at 12. "Mala prohibita" means "wrong because prohibited." Acts that are not inherently immoral and are wrong only because statutorily forbidden are *mala prohibita*.

442. The crimes involved in early Supreme Court strict liability litigation were felonies. See note 177 *supra*.

443. "A high official in a large corporation can commit undeniably serious crimes in the area of . . . clean air or water standards . . ." 445 U.S. at 275.

444. R. PERKINS, *supra* note 124, at 12-13.

445. Jail time is perceived by the public as less severe than prison time. Erickson & Gibbs, *supra* note 350, at 111. This perception will affect calculation of the appropriate "proportional punishment." It does not follow, however, that the crime for which one is sent to jail is viewed as less morally serious merely because a jail sentence is chosen.

guidance. Prior case law, however, offers no help. *Robinson* could have been a starting point, for it could have stood for the proposition that no act can be criminalized that is not morally based. That is, *Robinson* might have established a requirement of harm, mens rea, and a voluntary act. It was not so interpreted. All *Robinson* held was that a state cannot criminally punish involuntarily caused social harm.⁴⁴⁶ Likewise, the strict liability cases could have called for a requirement of mens rea in all criminal prosecutions, or could have required mens rea as a prerequisite to the labeling of a crime as a felony. Instead, they upheld the treatment of strict liability crimes as felonies, punishable by significant terms of years in a state penitentiary.⁴⁴⁷ If one cannot, according to *Rummel*, draw meaningful lines as to the seriousness of offenses on the basis of the presence or absence of violence or the nature or amount of property injured, taken, or even risked, then one cannot apparently draw the line to create a clear division between a true felony and a petty offense.

Footnote 11, to have any real meaning, will put pressure on the Court to look at the core of the criminal law in order to decide what makes a criminal act a felony. In view of its history of avoiding such issues, or of handling them in an insensitive or confused fashion, the promise of meaningful analysis is slim. In light of a legal profession's general dislike for litigation premised on philosophical grounds, such litigation will probably not be argued in proper fashion.

If the Court does confront the issue and thereby avoid rendering footnote 11 meaningless, it may need to reconsider prior nonproportionality distributive justice cases, most particularly strict liability case law. If it does not choose to reconsider prior decisions, or if it affirms them, no principled line appears to exist between legitimate felonies and mere petty offenses. Footnote 11 may stand for nothing more than the observation that the imposition of some punishment for some crimes irrespective of any utilitarian justification, cannot be countenanced because that imposition would "shock the conscience" of the community.⁴⁴⁸ Perhaps the test comes close to that suggested by the State of Texas in oral argument: the punishment "must have a rational basis supported by civilized thought that is thinkable in our system."⁴⁴⁹ So understood, footnote 11's extreme example is as much explainable in the specific language of the eighth amendment as it is in terms of the judicially created doctrine of proportionality. Ironically, gross disproportionality would then come to mean only "immediately apparent disproportionality," and would be found to exist more as an intuitive subjective reaction than as a result of objective jurisprudential analysis. In light of the fact that mala prohibita offenses

446. See notes 190-98 *supra* and accompanying text.

447. See notes 177-88 *supra* and accompanying text. See generally notes 457-66 *infra* and accompanying text.

448. *Accord, In re Lynch*, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972) ("so disproportionate . . . that it shocks the conscience and offends fundamental notions of human dignity").

449. Oral Argument, *supra* note 1, at 36.

are now punishable by significant terms of years, footnote 11 may only be applicable in cases of infliction of life imprisonment for the most petty of mala prohibita offenses, ones for which only minor fines would seem appropriate.

C. *Federal Versus State Legislation*

Proportionality remains alive, but not well, in state length-of-incarceration cases. Its health may be no better with federal legislation. *Rummel* is concerned with the dual doctrines of separation of powers and federalism. The first doctrine should apply equally to punishment inflicted as a result of federal legislation. The latter concern, however, is irrelevant to congressional legislation.

Much of the language in *Rummel* was nonspecific on this point. The Court spoke of "reluctance to review legislatively mandated terms of imprisonment"⁴⁵⁰ and stated that the "line-drawing process . . . is pre-eminently the province of the legislature."⁴⁵¹ In addition, the Court quoted a Supreme Court case that involved federally imposed punishment, stating that "whatever views may be entertained regarding severity of punishment . . . these are peculiarly questions of legislative policy."⁴⁵² Finally, the Court remarked that recidivist punishment is "largely within the discretion of the punishing jurisdiction."⁴⁵³ Naturally, deference justified by notions of separation of powers applies equally to federal and state legislation.

Nonetheless, proportionality should remain a more viable doctrine with federal legislation. Although the speculativeness of the intrajurisdictional and "seriousness of offense" tests remains, the interjurisdictional test is more feasible in a federal case. If Congress sets punishment significantly higher than the great majority of its constituent states, the legislation should be far more subject to a finding of unconstitutionality because such a conclusion would violate no federalist theory.

D. *Federal Versus State Courts*

The concept of proportionate punishment can remain a justiciable issue in the state, as distinguished from the federal, courts. The legal profession should take the opportunity to educate state courts regarding errors in the majority opinion. Sympathetic state courts have two alternatives to the *Rummel* opinion. First, they can apply their own state constitution, where applicable, to require proportionate punishment.⁴⁵⁴ Secondly, as *Rummel* is a decision of abstention rather than legal principle, the eighth amendment still incorporates a proportionality principle. Therefore, a state court can choose to be less deferential than the Supreme Court and apply the

450. 445 U.S. at 274.

451. *Id.* at 275.

452. *Id.* at 282 n.27 (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)).

453. 445 U.S. at 285.

454. *E.g.*, *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

extant precept of justice.⁴⁵⁵ Indeed, Justice Rehnquist's opinion supports this deferential treatment. *Rummel* stated that changes in sentencing procedure must find their source "in the legislatures, not in the federal courts." While a federal court may be hesitant to declare state legislation unconstitutional because of its concern of chilling federalist experimentation and diversity, a state court does not share this rationale for deference. Although separation of powers may argue for caution by a state court, the interjurisdictional test should serve as a valid basis for declaring one's own law disproportionate.

E. *Effect of Rummel on Other Concepts of Substantive Criminal Law*

1. *Defining Crimes*. Professor Henry Hart has written:

Despite the unmistakable indications that the Constitution means something definite and . . . serious when it speaks of "crime," the Supreme Court of the United States has hardly got to first base in working out what that something is. From beginning to end, there is scarcely a single opinion by any member of the Court which confronts the question in a fashion which deserves intellectual respect.⁴⁵⁶

As already noted,⁴⁵⁷ neither the mens rea nor the excuse cases took the opportunity to define the nature of "crime" in a society founded on a personhood principle. Although the *Winship* line of cases⁴⁵⁸ may be viewed as merely procedural, burdens of proof are not only often determinative of outcome, but also profoundly impact upon matters of substance. *Patterson* limited *Mullaney's* interpretation of *Winship* by requiring that the government carry the burden of persuasion only as to prima facie elements of crimes. After *Patterson*, therefore, a legislature can label a previously prima facie element of a crime as an affirmative defense, and thereby constitutionally shift the burden of persuasion to the defendant. The obvious danger of *Patterson*, of course, is that without limits on the meaning of "crime," virtually any "element" could become a defense.

Patterson did set limits to such abuse. It expressly stated that a legislature may not declare an individual presumptively guilty of crime, nor may it upon the finding of an indictment or proof of the identity of the accused, presume the presence of all elements of a crime.⁴⁵⁹ These limits, of course, are meaningless unless one defines the nature of a crime. In the absence of such a definition, the limits expressed in *Patterson* would not preclude a legislature from defining murder as merely the voluntary killing of a human being and then permitting as a defense proof that the defendant's

455. One state court has already so interpreted *Rummel*. *State v. McDaniel*, 228 Kan. 172, 612 P.2d 1231 (1980). The decision stated that under *Rummel*, "we are not required by the 8th Amendment" to conduct proportionality analysis. 612 P.2d at 1242 (emphasis in original). Nonetheless, it did, although for good measure it interpreted its own constitution to so require it. *Id.* See also notes 406, 454 *supra* and accompanying text.

456. Hart, *supra* note 13, at 431 (footnotes deleted).

457. See text accompanying notes 177-228 *supra*.

458. See text accompanying notes 199-213 *supra*.

459. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

actions were nonmalicious. Nor would it prevent a state from making it a crime to drive an automobile, leaving as a defense the fact that the person was licensed and drove safely.

If due process is not to lose its meaning, however, a more significant limitation than expressly offered by *Patterson* is needed. The most plausible limitation suggested by commentators is that a legislature could properly transfer an element of a crime to the defense to the extent that the maximum punishment mandated by the statute is not grossly disproportionate to the crime as defined in the *prima facie* case.⁴⁶⁰ *Rummel*, of course, impinges on this suggestion. Although proportionality is constitutionally required, it is not likely to be any more viable in a *Patterson* case than it was in *Rummel*. Even if the Supreme Court accepted proportionality as a theoretical limit on legislative action in the shifting of the burden of persuasion, the same factors calling for deference in an eighth amendment case would require it in a due process framework. If *Patterson* is not to serve as an invitation to legislative abuse, another limit must be found, and it must be found by determining the inherent nature of a crime. As with the question of what is a felony, the Court offers little guidance in this area.

In *Patterson*, however, the Court demonstrated its awareness of the fact that the definition of crime is the crucial question by citing two other cases that make "the point [of limits] with sufficient clarity."⁴⁶¹ Unfortunately, the cases cited offered no answers. One case involved a statute that made it a crime for aliens to occupy land for agricultural purposes.⁴⁶² Because the statute authorized that upon proof of occupation of such lands and allegation of alienage the burden was upon the defendant to prove his citizenship, it was declared unconstitutional. The Court stated that a burden of proof could be shifted only when "the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation."⁴⁶³ In that case, the burden of proof was unjust because the lease of land conveyed "not even a hint of criminality."⁴⁶⁴ The case contained little clarification of this point. Likewise, in the other cited case,⁴⁶⁵ the Supreme Court held only that the shifting of the burden of persuasion may not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁴⁶⁶ Thus, it appears that in defining a *prima facie* case a legislature must minimally require proof of some criminality. Criminality, however, apparently does not require a *mens rea*, so the state need only prove that the defendant did something that caused harm. The question of what is

460. Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1365-97 (1979).

461. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

462. *Morrison v. California*, 291 U.S. 82 (1934).

463. *Id.* at 88-89.

464. *Id.* at 90.

465. *Speiser v. Randall*, 357 U.S. 513 (1958).

466. *Id.* at 523 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

harm then remains. Furthermore, while the legislature must not act so as to offend some fundamental principle of justice, the perimeters of this limitation remain wholly undefined.

The answer to these questions, of course, can only be found by analysis of philosophical questions in the context of the principle of personhood and can only be resolved if the judiciary is willing to review legislative action. *Rummel* will either force the Court to do what it does not wish to do, or it will leave legislatures with unlimited power in the defining of crimes and the placement of burdens of persuasion.

2. *Strict Liability and Excuses.* *Rummel* had no direct effect on either of these lines of distributive justice decisions. It did undercut efforts, however, to change the Court's direction in these areas. A significant argument against previous strict liability decisions was that they permitted disproportionate punishment. This claim, never argued before, is now virtually lost. *Rummel*, more dramatically than any prior case of distributive justice, displayed the Court's unwillingness to intrude very far into the substantive criminal law. If the Court will not seriously review legislatively mandated punishment, it is even more unlikely that it will incorporate the law of defenses, which goes to the very core of substantive criminal law doctrine, into the Constitution.

VI. CONCLUSION

Rummel v. Estelle represents a substantial departure from *Weems* and *Coker*, but is consistent with an unhealthy trend in Supreme Court adjudications of issues implicating matters of substantive criminal law. *Rummel* demonstrates more clearly than any prior case the Court's insensitivity to the importance of the concept of distributive justice, its fear of or disinterest in philosophical adjudication, and its lack of sound understanding of various basic jurisprudential doctrines.

The effect of *Rummel* on the modern effort to create a constitutional principle of just punishment will be substantial. Disproportionate punishment is a widespread fact. Its existence is damaging to society and to the individual imprisoned. Even Chief Justice Burger has condemned the "lock them up and throw the keys away" mentality as creating more problems than it solves.⁴⁶⁷ *Rummel* treats recidivists as virtual outcasts. Although such treatment is against the rule of *Weems*, no umpire is willing to enforce that rule. One can only hope that efforts will be made by lawyers to open wider the doors not fully shut and that the Supreme Court will not reject such efforts.

The effect of *Rummel* upon efforts to reform the substantive criminal law can be staggering, particularly in the definition of crimes and in the incorporation of mens rea and defenses into the Constitution. Substantive criminal law will stagnate unless the legislature is willing to act conscien-

467. Burger, *Our Options are Limited*, 18 VILL. L. REV. 165, 167 (1972).

tiously and in informed fashion or the judiciary becomes willing to handle philosophical issues and to become learned in jurisprudence. The legal profession has a duty to realize the importance of these doctrines and to help educate both branches of government.